# 93-938

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

ALEX DANDY,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the court of appeals disregarded this Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), when, without citing or discussing that case, it affirmed a 23-year term of imprisonment on tax and fraud charges imposed by a judge who refused to disqualify himself from presiding over a trial in which a principal complainant was a family company owned by "across-the-street" neighbors of the judge for 30 years and whose president, who testified as a prosecution witness for almost two trial days, was a friendly acquaintance of the judge and had contributed to the judge's political campaigns.

2. Whether the court of appeals, after acknowledging that it had erroneously invoked, in a criminal case, civil rules of procedure as a ground for ruling that petitioner had waived a claim that the evidence failed to support a guilty verdict, erroneously stood by its waiver ruling on the plainly mistaken ground that a defendant making a motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure waives any factual insufficiency that he does not specifically describe.

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No. 93 -

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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# PETITION FOR A WRIT OF CERTIORARI

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Petitioner Alex Dandy respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on June 7, 1993 and amended on August 11, 1993.

## OPINIONS BELOW

The original decision of the United States Court of Appeals for the Sixth Circuit (App. A, pp. 1a-27a, *infra*) and the amendment to that decision (App. B, pp. 28a-33a, *infra*) are reported as one decision at 998 F.2d 1344. The Order of the District Court denying defendant's Motion for Disqualification of District Court Judge (App. C, pp. 34a-38a, *infra*) is not reported.

## JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was rendered on June 7, 1993. In response to a timely petition for rehearing and suggestion for rehearing en banc, the panel issued an amended decision on August 11, 1993. At the suggestion of the Court, the parties filed supplemental memoranda with respect to the petition for rehearing and suggestion for rehearing en banc. No judge requested a rehearing en banc and the petition for rehearing was denied by the original panel on September 15, 1993 (App. E, p. 41a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 455(a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

2. Rule 29 of the Federal Rules of Criminal Procedure provides in relevant part:

> Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

## STATEMENT

### 1. Introduction

After being found guilty by a jury on ten counts of an eleven-count indictment charging him with tax evasion (26 U.S.C. § 7201), mail fraud (18 U.S.C. § 1341), and other offenses growing out of arrangements under which he secretly benefited from rebates and other payments made by dairy and grocery suppliers who sought to supply his food market chains, petitioner was sentenced by the presiding judge, Hon. Robert H. Cleland, to a total of 23 years' imprisonment. On appeal, petitioner contended, *inter alia*, that the district judge should have disqualified himself under 28 U.S.C. § 455(a) because of a long-standing personal relationship with an important prosecution witness and with the family that owned one of the three suppliers that provided him with payments. Petitioner also claimed, with respect to two tax evasion counts, that the district judge should have granted his motion for judgment of acquittal.

Without discussing or citing this Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) (which had been cited by the petitioner in his appeal brief but was omitted from the government's brief), the court of appeals rejected petitioner's argument regarding the judge's disqualification because the case was tried to a jury and because the witness who was a friend of the judge "was simply one of many government witnesses" (App. A, p. 8, *infra*).

The court of appeals also rejected petitioner's argument that he was entitled to a judgment of acquittal on the tax evasion counts because petitioner had failed to move, on this ground, for a new trial or for judgment notwithstanding the verdict. The court cited, as precedent, a civil case which it had decided in 1986.

In a petition for rehearing, petitioner urged the Court to reconsider his argument that the judge should have disqualified himself based on this Court's *Liljeberg* decision and also objected to the panel's reliance on civil-case precedent as a ground for finding he had waived the claim that he was entitled, under Rule 29 of the Federal Rules of Criminal Procedure, to a judgment of acquittal.

The court of appeals requested a response from the government, which again ignored totally this Court's *Liljeberg* decision. It also asserted that defense counsel's statement that he was making a "general renewal of our Rule 29 motions at the end of the case" waived the claim that there was no evidence of acts of evasion within the six-year limitations period.

The court of appeals then issued an amendment to its earlier opinion. It withdrew its discussion of civil procedure.

It did not, however, change its holding that petitioner had waived his argument for acquittal with respect to the tax evasion counts. Instead it relied on decisions that had found a waiver of a venue objection when defense counsel had specified grounds other than venue in his Rule 29 motion. The Court held that petitioner had waived his sufficiency-of-the-evidence challenge by not specifically arguing it to the district court in his Rule 29 motion. The amendment did not discuss the disqualification issue or cite the *Liljeberg* decision. In our view, the court of appeals plainly erred in both respects, and its decision should be vacated summarily and the case remanded for consideration of the issues that were pretermitted.

## 2. The Original and Superseding Indictments

Petitioner was first charged on December 14, 1990, in an 11-count indictment. The first two counts of the indictment alleged tax evasion for the years 1982 and 1983 in the filing of false tax returns on June 13, 1983, and July 3, 1984. Petitioner moved for dismissal of these counts on the ground that they were barred by the six-year statute of limitations, 26 U.S.C. § 6531. The prosecution responded with a superseding indictment filed on April 12, 1991, which added an allegation that petitioner had concealed and attempted to conceal records of unreported income (J.A. 45-47). [1/]

Count Eight of the original and superseding indictments charged a scheme to defraud by use of the mails in violation of 18 U.S.C. § 1341. It alleged, *inter alia*, that petitioner had Chatham Supermarkets and Hamady Brothers Food Markets — two companies that he owned and controlled — purchase

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1/ "J.A." refers to the three-volume Joint Appendix filed in the court of appeals.

dairy products from London's Farm Dairy, Inc., a wholesale supplier of dairy products. Count Eight went on to charge that, as a condition for these purchases, petitioner demanded that London's pay a "kickback" in the amount of $200,000 plus a percentage of London's profits to a dummy corporation that petitioner controlled, and that checks in varying amounts between $10,000 and $30,000 were regularly drawn by London's to the dummy corporation. (J.A., 39-40, 51-53) The key government witness with respect to this Count was Douglas Mowat, then President of London's Farm Dairy.

### 3. Judge Cleland Makes a Unilateral Disclosure

Approximately one month after the superseding indictment was returned, on May 14, 1991, counsel appeared for the purpose of arguing various motions. In chambers, the district judge advised counsel that he had noted the name of London's Farm Dairy, Inc., in the indictment, and he inquired whether any officer of London's would be testifying for the prosecution. He was told that Douglas Mowat would be a government witness. The judge then advised counsel of his long-standing personal relationship with the London family and with Mr. Mowat. In open court and on the record, Judge Cleland said (App. F, pp. 43a-44a, *infra*):

> At that time I notified both sides that I was acquainted with a person whom I since have been informed will be a witness in this case.
>
> This individual's name is Douglas Mowat, who is an executive with London Farm Dairy, Inc. which is a Michigan corporation with its headquarters, as I'm informed, its headquarters in Port Huron, Michigan.

I hale from Port Huron, Michigan, maintain a home there and have been acquainted with various members of the London family over the course of twenty -- closer, really, to thirty years.

I informed counsel that Glen London, one of the senior members of that family, was an across the street neighbor of my parents and myself when I was in college -- up through the time I was in college and law school. To my knowledge he's no longer associated with the corporation, I think he's retired from that. I may be incorrect, but in any event I'm acquainted with a friend of his.

Additionally, I am acquainted with a Michigan State representative named Terry London, who is from the Port Huron metropolitan area, Marysville, Michigan. He's not, to my knowledge, in any way associated with the corporation but is a -- I think he's a nephew of Glen London and his son or one of the other London brothers.

He's fulltime in public service, though, to the best of my knowledge.

Finally with respect to Douglas Mowat, this is an individual whom I have known for close to twenty years in one fashion or another, as he was working his way up through the corporate structure.

He and I, though we are on friendly acquaintance terms, have never socialized at one another's houses. We have commonly met, however, at community functions, dinners, testimonials, fund raisers and things of that nature over the course of years.

Before I took this job I was an elected official in St. Clare County, I was the prosecuting attorney of that county, and although I did not have political opposition in any of my campaigns, I did throw fund raiser celebrations annually. And although I'm not positive of it, I would expect that Mr. Mowat and probably his wife, quite likely others from the London organization, were contributors to my campaign to the tune of perhaps ten or twenty dollars apiece, something along those lines.

I expect that that was sporadic and not regular, and in no event do I think there was anything particularly significant about that -- significant financially about any of that.

I think I haven't seen Mr. Mowat in well over a couple of years now and certainly have not had any discussion with him over the facts of this case during any of this time.

Nor do I think I have discussed his business with him at all, quite frankly. I have discussed community affairs perhaps from time to time but not anything about London Dairy.

> Now, that in combination with the fact that I occasionally drink London's milk and eat London's ice cream puts the parties fully on notice, I think, as to — in terms of what the Court may personally have in the way of history on this affair.

After making this disclosure on the record, the district judge pressed defense counsel for a decision as to whether argument on the motions could continue before him. Counsel replied that he needed more time to consider the question and to do investigative work (App. F, p. 46a, *infra*). The judge replied that his feeling was that he was "far enough distant from any particular friendship or former association with Mr. Mowat or any of the others in the London organization" that he would not be influenced by any animosity that they would have against the petitioner (p. 47a, *infra*). The prosecutor then argued that the judge's acquaintance with Mowat would not have "any conceivable impact on the jury, which is going to be the finder of fact in this case" (p. 48a, *infra*) The judge replied, "The concern I would have from the defense side of this would be in the event of conviction and impending sentence" (p. 48a, *infra*).

### 4. Judge Cleland Rejects Disqualification

Petitioner moved two days later that Judge Cleland disqualify himself pursuant to 28 U.S.C. § 455(a). On May 30, 1991, the district judge denied the motion, principally on the ground that the case would involve a jury trial, so that the judge would not be ruling on the credibility of the witness who was his acquaintance. The judge also rejected petitioner's concerns regarding his possible bias in sentencing (a concern he himself had raised) noting erroneously that any sentence would be subject to the "leveling and objectifying

effect" of the Sentencing Guidelines. (App. C, p. 37a, *infra*). In fact, the alleged offense was committed before November 1, 1987, and the Guidelines are inapplicable, as the judge recognized when sentencing Mr. Dandy to 23 years' imprisonment (J.A. 761). The judge neither cited nor discussed this Court's decision in *Liljeberg* in his 5-page Order. See App. C, pp. 34a-38a, *infra*.

### 5. Motions for Judgment of Acquittal

The trial was conducted between September 11, 1991, and November 20, 1991. At the conclusion of the prosecution's case, defense counsel moved for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. Defense counsel relied on the written motion regarding the statute of limitations that had been filed before the return of the superseding indictment and stated that "[a]t the time we made the motion prior to trial, we did not have the testimony of . . . the most critical witness with regard to the government's position that the statute of limitations was extended with regard to Counts 1 and 2 . . . ." (App. G, p. 53a, *infra*). Counsel then went on to explain why the testimony of "the most critical witness" regarding alleged acts of evasion within the limitations period could not support a guilty verdict (pp. 53a-54a, *infra*). He argued that there was insufficient evidence that any acts of evasion had occurred within the six-year limitation period. The prosecutor responded with his own analysis of the testimony, and the judge agreed with the prosecutor (pp. 54a-56a, *infra*).

At the conclusion of all the evidence, defense counsel renewed the Rule 29 motion. He said, at that time, that he was entering "a general renewal of our Rule 29 motions" (Transcript, Vol. 36, p. 9). The district judge denied the motion.

## 6. The Sentence

Following his conviction, petitioner was sentenced by Judge Cleland on May 22, 1992. The judge imposed a sentence of 23 years' imprisonment — three years each on counts 1, 2, 3, 6, 8, 9 and 10 and two years on count 11. The sentences were to run consecutively (J.A. 768-69). No sentence was imposed on counts 4 and 5, which were lesser included offenses.

## 7. The Appeal

Petitioner's principal argument on appeal was that Judge Cleland should have recused himself under 28 U.S.C. § 455(a). The government's brief in the court of appeals did not cite or discuss this Court's *Liljeberg* decision. (The full argument in the government's brief is reprinted as App. H, pp. 57a-61a, *infra.*)

Petitioner also claimed on appeal that the evidence was insufficient to support a guilty verdict on Counts 1 and 2 because there was no evidence of acts of evasion within six years prior to return of the superseding indictment. The prosecution did not claim that the argument was waived. It argued only that there was evidence of evasion within the limitations period. Brief for the United States, pp. 37-38.

The court of appeals refused, however, to consider the sufficiency of the evidence. Its full discussion of this issue was as follows (App. A, p. 23a, *infra)*:

> Defendant next argues that evidence of affirmative acts of evasion within the statutory period is insufficient to sustain his conviction on Counts 1 and 2. This issue is reviewed on

> appeal from the district court's ruling on either a motion for a new trial or a motion for judgment not withstanding the verdict. *Dixon v. Montgomery Ward*, 783 F.2d 55 (6th Cir. 1986). Defendant does not claim nor does the record reveal that defendant has made either motion. Therefore, we decline to consider this issue.

On the disqualification question, the court of appeals held that the district judge's decision was reviewable only for abuse of discretion. It found that the witness, Douglas Mowat, was merely an acquaintance and not a personal friend of Judge Cleland and that the judge was "not called upon to evaluate the credibility of Mowat because defendant Dandy was tried by a jury" (App. A, p. 8a, *infra*). The court also observed that Mowat was only one of many government witnesses and "did not have a personal stake in the outcome" (p. 8a, *infra*). In support of the last proposition, the court of appeals cited a district court ruling in a civil case. *Liljeberg* was not cited or discussed.

## 8. Petition for Rehearing

Petitioner noted in his petition for rehearing that the civil rules invoked by the court of appeals as a basis for its finding of waiver did not apply in a criminal case. Petitioner also sought rehearing on the disqualification issue and again cited and discussed the *Liljeberg* decision.

The court of appeals directed the prosecution to respond to the petition. The prosecution's response did not discuss *Liljeberg*. It did, however, argue that the motion for judgment of acquittal regarding Counts 1 and 2 had been

waived because it was not elaborated during defense counsel's argument.

On August 11, 1993, the court of appeals amended its opinion by deleting the paragraph that had invoked the procedures applicable to civil cases and substituting an extended section that held that the motion for judgment of acquittal based on insufficiency of the evidence had been waived. The court relied on decisions that had found waiver of an objection to venue where that objection was not specified in a motion under Rule 29.

Petitioner was then asked whether, in light of this amendment, he wished "the petition for en banc reconsideration . . . to be withdrawn." (App. D, p. 39a, *infra*). Petitioner persisted in seeking *en banc* reconsideration and rehearing, and both were denied on September 15, 1993 (App. E, p. 41a, *infra*.).

## REASONS FOR GRANTING THE WRIT

### 1. This Court's Standard for Judicial Disqualification Articulated in *Liljeberg* Was Wholly Disregarded by the Courts Below.

This Court twice heard argument in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), and rendered an authoritative judgment in that case requiring a judge to disqualify himself whenever there is even an *appearance* of partiality or impropriety by reason of his participation. The principles set forth in *Liljeberg* were disregarded *in toto* in this case, to the extent that this Court's decision was never discussed or even cited by either the

district court or the court of appeals. And the prosecution, which vigorously urged Judge Cleland to remain in the case from the very early stage when he disclosed his friendship with the London family and with Mr. Mowat through his imposition of an extraordinarily harsh 23-year term of imprisonment, [2] also failed to consider or present to the court the standards of the *Liljeberg* decision. Instead, Judge Cleland rejected the request that he disqualify himself, and the court of appeals found that his conclusion was not an "abuse of discretion," for several reasons that ignore the prophylactic purpose of 28 U.S.C. § 455(a) — "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." 486 U.S. at 865.

(a) Whether the judge was personally "obligated" to Mowat — The court of appeals' first stated ground for permitting Judge Cleland to preside over the case was that the judge did not have an "intimate, personal relationship" with Mowat or one in which he was "obligated" to Mowat (App. A, p. 8a, *infra*). But under the *Liljeberg* standard that emphasizes the "appearance of impropriety," the judge's subjective "obligation" is irrelevant. *Liljeberg* makes clear that "[s]cienter is not an element of a violation of § 455(a)." 486 U.S. at 859. The judge's many years of friendship with Mowat, added to the fact that Mowat had contributed to the

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[2] By contrast, the jail terms imposed in other celebrated recent tax evasion cases have been far smaller. See, *e.g.*, *United States v. Helmsley*, 941 F.2d 71 (2d Cir. 1991)(Leona Helmsley sentenced to four years for 33 counts of tax evasion and mail fraud); *United States v. LaRouche*, 896 F.2d 815 (4th Cir. 1990)(Lyndon LaRouche sentenced to 15 years for 13 counts of mail and tax fraud involving over $30 million in loans); *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991)(inside trader sentenced to four years for nine counts of tax and securities fraud); *United States v. Atkins*, 869 F.2d 135 (2d Cir. 1989)(Charles Atkins sentenced to two years for supervising tax fraud scheme involving hundreds of millions of dollars in false tax deductions for investors).

judge's political campaigns and that he headed the business of a family that was a neighbor of the judge's, would cause an objective observer to question the judge's impartiality. *Id.* at 861. This is particularly true since Mowat testified that petitioner had forced him to pay large kickbacks from the funds of London's Farm Dairy.

(b) Whether the case was to be tried to a jury — In his initial statement immediately following disclosure of his relationship to the London family and to Mr. Mowat, as well as in his order denying the disqualification motion, Judge Cleland relied on the fact that petitioner was to be tried by a jury. The court of appeals also invoked this ground for affirming the judge's conclusion. There is no indication, however, in Section 455(a) or in this Court's *Liljeberg* opinion, that the identity of the trier of fact makes any difference whatever in determining whether there is an *appearance* of partiality or impropriety in a particular judge's participation in a case. The identity of the trier of fact may affect *actual* prejudice; it does not bear upon appearances.

(c) Whether the complainant or witness was a victim — The court of appeals concluded its discussion of this issue by refuting the proposition that London's or Mowat was a "victim" of petitioner's alleged offense. The extent to which a witness was "victimized" by the defendant is not, however, the critical question in determining whether there was an appearance of impropriety. What is important is that the Londons had been acquaintances of the judge for over twenty years, that one London was a long-term neighbor of the judge, that the current president of the company — who was to testify as a government witness — had been a friendly acquaintance for many years and had contributed to the judge's political campaigns, and that the firm and its president were aligned with the prosecution in this case.

Petitioner's counsel attempted to establish at trial that Mr. Mowat had lied in his grand jury testimony and was, therefore, also lying at trial (Transcripts, Vol. 11, pp. 40-42, Vol. 34, pp. 118-131, Vol. 35, pp. 13-15). The image of Judge Cleland presiding over proceedings in which Mowat's credibility was attacked is surely one that — given their personal relationship — does not enhance the appearance of justice administered in federal courts. In his sentencing, the judge excoriated petitioner for "intimidat[ing] and financially seduc[ing] merchants." (J.A. 764) The judge's acquaintance, Mr. Mowat, was one of three merchants so "seduced." The *appearance* of partiality certainly exists, in these circumstances, when the trial judge imposes a 23-year prison term, as Judge Cleland did. Indeed, when the issue of disqualification first arose, the judge himself acknowledged that his concern was "in the event of conviction and impending sentence" (App. F, 48a, *infra*).

A fair application of *Liljeberg* would have resulted in Judge Cleland's disqualification. Indeed, under similar circumstances, the Fifth Circuit, recognizing "the strictness with which section 455 is to be applied," held that a district court judge should have disqualified himself "despite the total absence of any showing of actual bias." *In re Faulkner*, 856 F.2d 716, 720-21 (5th Cir. 1988). In *Faulkner*, the judge's cousin had participated in transactions forming the basis of the indictment and there was a possibility that she would be called as a witness. Although the court emphasized that it did not question the judge's ability to preside over the case even-handedly, it held that disqualification was required because "'his partiality might reasonably be questioned' by a reasonable observer." *Id.* at 721. These same concerns apply here, particularly in view of the very early stage when the question was raised. At the time, motions addressed to the

indictment had not even been argued, and the case could, with great facility, have been reassigned.

This Court should grant certiorari and vacate the judgment below to reaffirm that *Liljeberg* means what it says and that it must be followed and obeyed by the lower courts. The decision of the courts below is such an extreme departure from the standards of *Liljeberg* that the decision must be reversed not only to achieve justice here but to "prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." 486 U.S. at 868.

## 2. The Court of Appeals' Belatedly Discovered "Waiver" Rationale Foreclosing Consideration of Petitioner's Challenge to the Sufficiency of the Evidence Conflicts with the Accepted Federal Rule.

Having mistakenly relied on a procedural proposition applicable only to civil cases when it first sought to avoid passing on the sufficiency of the evidence to sustain Counts 1 and 2, the court of appeals stood its ground on the petition for rehearing by invoking another waiver principle that is both demonstrably wrong and demonstrably inapplicable. If taken at face value, the court of appeals' extraordinary holding that a challenge under Rule 29 to the sufficiency of the evidence is waived if it is not spelled out in detail in counsel's oral presentation conflicts with decisions of the Second and Seventh Circuits, and is even contradicted by another Sixth Circuit ruling.

(a) The Conflict — In the amendment to its opinion dated August 11, 1993, the court of appeals held that "where a Rule 29 motion is made on specific grounds, all

grounds not specified are waived" (App. B, p. 31a, *infra*). That legal proposition conflicts with the rule applicable in the Second Circuit. See *United States v. Gjurashaj*, 706 F.2d 395, 399 (2d Cir. 1983)("defendants [need] not cite chapter and verse of the weakness of the case against them"). In *Gjurashaj*, the defendants moved for a judgment of acquittal under Rule 29 and did present argument with respect to the government's failure of proof. The government argued that because they had not referred to a particular count and had not delineated the failure of proof as to that count, the defendants waived that issue. The Second Circuit firmly rejected this argument. *See also, United States v. Jones*, 174 F.2d 746, 748 (7th Cir. 1949)("the defendant is not required to go over the proof for the benefit of the Government or the court, in the absence of some request for more specific objection"). And the Sixth Circuit has itself had applied the *Gjurashaj* and *Jones* cases in *United States v. Dodge*, 983 F.2d 1069 (6th Cir. 1993).

The interpretation of Rule 29 applied in this case by the Sixth Circuit has highly undesirable consequences. It means that a defense counsel must, at the time of making a Rule 29 motion, elaborate equally *all* possible grounds for a judgment of acquittal. This requirement will unduly extend trials and, in certain cases, result in the unexpected foreclosure of valid claims that trial lawyers — familiar with the ground-rules before this case — believed would be considered.

(b) **Inapplicability of Precedents** — The judicial precedents cited by the court of appeals in its amended opinion are inapplicable to this case. All the cited cases held that if a defendant moves under Rule 29 for a judgment of acquittal on specific grounds and fails to mention venue, the objection to venue is waived. See *United States v. Rivera*,

388 F.2d 545, 546 (2d Cir.), *cert. denied*, 392 U.S. 937 (1968); *Gilbert v. United States*, 359 F.2d 285, 288 (9th Cir.), *cert. denied*, 385 U.S. 882 (1966); *United States v. Brothman*, 191 F.2d 70, 72-73 (2d Cir. 1951) (dictum); *United States v. McMaster*, 343 F.2d 176, 181 (6th Cir.), *cert. denied*, 382 U.S. 818 (1965). These cases did not extend this doctrine beyond the specific issue of venue. As the Seventh Circuit specifically emphasized in *United States v. McDonough*, 603 F.2d 19, 22 (7th Cir. 1979), when it adopted this rule:

> Venue is different from other evidentiary issues raised at the time of the motion for acquittal. The Constitution makes proof of venue a part of the Government's case, but the defendant may waive this right. It is not an essential fact constituting the offense charged . . . and need only be proved by a preponderance of the evidence.

The court of appeals invoked this inapplicable rule in an effort to sustain the decision it had previously reached not to examine the sufficiency of the evidence to support Counts 1 and 2. The waiver rationale that the court utilized is simply inapplicable to the facts of this case, and, for that reason, the case should be remanded for a decision by the court below on the merits of petitioner's challenge to the sufficiency of the evidence. [3/]

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[3/] The Sixth Circuit ruling is all the more inexplicable given that petitioner's counsel *did* specifically argue in the trial court that the evidence was insufficient to show acts of evasion within the limitations period — precisely the issue the Court of Appeals strained legal precedents to find waived. See App. G, pp. 52a-54a, *infra*.

### 3. Summary Reversal Is Appropriate.

The two errors we have discussed render petitioner's 23-year prison term singularly unjust. He should have been tried and sentenced before a different judge. At least, the trial judge and the court of appeals should have accorded greater weight than they did to the *appearance* of partiality or impropriety. Moreover, the court of appeals should have examined petitioner's claim that the evidence was insufficient, in light of the statute of limitations, to find him guilty of tax evasion for the years 1982 and 1983.

Both of these issues can be resolved summarily, without plenary briefing and argument. It is clear from the opinions below, as well as from the relevant portions of the government's argument and appellate brief, that this Court's *Liljeberg* decision was simply ignored by the courts below and by the government. It is also clear that the stated ground for failing to review the sufficiency of the evidence on Counts 1 and 2 is untenable. This Court could, therefore, without setting the case for briefs and argument, vacate the judgment and remand the case to the court of appeals for it to consider and apply *Liljeberg* and to weigh the adequacy of the evidence on Counts 1 and 2. Compare, *e.g.*, *Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809 (1986); *Seaboard Air Line R.R. v. United States*, 382 U.S. 154 (1965). *See also, United States v. Nachtigal*, 113 S. Ct. 1072 (1993); *Espinosa v. Florida*, 112 S. Ct. 2926 (1992); *Hunter v. Bryant*, 112 S. Ct. 534 (1991); *Mireles v. Waco*, 112 S. Ct. 286 (1991); *Freeport-McMoran, Inc. v. K N Energy, Inc.*, 498 U.S. 426 (1991); *Cage v. Louisiana*, 498 U.S. 39 (1990); *Temple v. Synthes Corp.*, 498 U.S. 5 (1990).

## CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted and the judgment of the court of appeals should be vacated.

Respectfully submitted,

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# APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 92-1702/1840
**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* | ) | |
| | ) | ON APPEAL from the United States District Court for the Eastern District of Michigan |
| v. | ) | |
| ALEX DANDY, *Defendant-Appellant.* | ) | |

Decided and Filed June 7, 1993

Before: MILBURN and RYAN, Circuit Judges; and COFFIN, Senior Circuit Judge. *

MILBURN, Circuit Judge. Defendant Alex Dandy appeals from the judgment of the district court dated May 22, 1992, on his convictions on ten counts of tax offenses, mail fraud, bankruptcy fraud, and obstruction of justice, all resulting from the jury's finding him guilty. He also appeals

* Honorable Frank M. Coffin, Senior Circuit Judge, United States Court of Appeals for the First Circuit, sitting by designation.

from the district court's "Corrected Judgment" entered on June 29, 1992, which eliminated an ambiguity in the judgment concerning his parole eligibility date. On appeal, defendant raises the following issues: (1) whether the trial judge erred in ruling that the judge's acquaintance with a government witness did not require his recusal, (2) whether the district court's limitations on cross-examination and its admission of certain evidence denied defendant his Sixth Amendment right to confront witnesses against him, (3) whether prosecutorial misconduct deprived defendant of a fair trial, (4) whether the district court's questioning of witnesses and commenting on the evidence deprived defendant of a fair trial, (5) whether Counts 1 and 2 of the indictment alleging tax evasion are barred by the statute of limitations, (6) whether Count 8 properly charged a violation of the mail fraud statute, (7) whether Count 9 properly charged a violation of the mail fraud statute, (8) whether the district court committed reversible error in refusing to instruct the jury that repayment is a factor to be considered in determining whether a particular transaction is a loan, and (9) whether the district court lacked jurisdiction to enter its corrected judgment. We affirm in part, vacate in part, and remand.

## I.

### A.

Defendant Alex Dandy purchased and controlled Hamady Brothers Food Markets, Inc. ("Hamady") through a holding company owned by his family trust. Dandy assumed control of Hamady's business in 1981.

McDonald Dairy was Hamady's dairy supplier, and it followed the common industry practice of paying rebates to its customers based on the volume of their purchases. Beginning

in late 1981, Dandy directed Hamady's accounting department to cash the rebate checks but to account for them as "gift certificates" issued to "Alex Dandy" rather than as rebates earned by Hamady. Dandy then endorsed each gift certificate and directed the accounting department to apply them as credits to his personal loan account with Hamady, thereby reducing the amount he owed. From 1982 to 1984, Dandy diverted more than $1 million in McDonald Dairy rebates through this gift certificate scheme. He also received small amounts from other wholesalers supplying goods to Hamady. He did not report any of this money on his personal income tax returns for 1982 through 1984.

During this same period, defendant also demanded that McDonald Dairy pay numerous bills he had incurred for items such as airline tickets, televisions, and limousine service. McDonald Dairy paid the bills in order to avoid losing its business to Hamady. Other suppliers also agreed to make such payments at Dandy's direction.

In one scheme, a bank account was opened by defendant's friend, Father Basil Kalekas, under the auspices of the "St. George Orthodox Church Pastor's Charitable Fund." Nearly all the money deposited to this fund was paid under Dandy's direction by Hamady's suppliers or by Hamady itself. About 80 percent of the money was then withdrawn as cash and given to defendant. Father Kalekas paid some small personal bills for charitable expenses from the fund, but all checks in the amount of $500 or more were paid at Dandy's direction to or on behalf of himself or his friends for their personal use. When Father Kalekas died, defendant demanded and received the remaining $27,000 in the fund from Kalekas' widow. During the years 1982 through 1984 and 1986, Dandy received about $375,000 in such third-party payments,

including $157,500 paid to the Pastor's Charitable Fund which Dandy never declared on his personal income tax returns.

Also during late 1981, Dandy began to obtain kickbacks from another Hamady supplier, M & B Distributors ("M & B"). He told M & B to raise the markup M & B charged Hamady by one-half percent and to use the resulting money to pay a salary to Dandy's son-in-law, David Kirdassi. Kirdassi never did any work whatsoever for M & B but received $38,400 yearly from 1982 through 1985 and an additional $6,400 in early 1986. None of these kickbacks were reported on Dandy's income tax returns.

On January 24, 1985, an Internal Revenue Service ("IRS") agent issued a summons to McDonald Dairy for records of rebate moneys it had paid to Hamady "or any officer" of Hamady. Defendant sought to cover up his gift certificate scheme by hiring new accountants, signing a note to pay back Hamady for the rebate moneys he had diverted to his account, and directing Hamady to file amended income tax returns declaring that the moneys were corporate income.

In November 1985, a second IRS subpoena was served on McDonald Dairy for records of rebate moneys paid during 1980, 1984, and 1985. Again, defendant directed McDonald Dairy to give the IRS only those checks payable to "Hamady Brothers Food Markets" and to withhold all checks which represented payments directly or indirectly to himself.

In March 1986, Dandy purchased options to buy all the common stock of Nu-Trax, Inc., d/b/a "Chatham Super Markets ("Chatham/Nu-Trax"). He also acquired proxies to vote all of the Chatham/Nu-Trax stock, gaining complete and exclusive control over the corporation. Using his control, defendant Dandy caused Chatham/Nu-Trax to greatly increase

its purchases from certain suppliers whom defendant directed to inflate their prices in order to pay for such things as a sham salary to his son-in-law and kickbacks to defendant's solely owned corporations. ADI International and Michigan Milk Movers, Inc. The sham salary and kickbacks were for "consulting fees" even though these entities provided no services whatsoever for anyone. The suppliers involved in the schemes included M & B Distributors, McDonald Dairy, and London's Farm Dairy ("London's") and the schemes involved several hundred thousand dollars.

Defendant Dandy also diverted numerous Chatham/Nu-Trax assets to himself causing Chatham/Nu-Trax to sell tractors, trailers, and other equipment to its suppliers at very low prices. He then directed the suppliers to pay the remaining value of this equipment to his wholly-owned corporation, ADI International, as "consulting fees," even though ADI International provided no consulting services. He also directed Chatham/Nu-Trax to pay ADI International over $275,000 in bogus "consulting fees." By 1986, it was clear that bankruptcy was inevitable for Chatham/Nu-Trax. Defendant then sold his worthless option on Chatham/Nu-Trax's remaining stock back to Chatham/Nu-Trax, forcing it to pay him cash and transfer real estate worth over $7 million. However, he kept his proxy for exactly one year and one day in order to prevent Chatham/Nu-Trax from declaring bankruptcy during the one-year period within which his option sale could be rescinded as an avoidable transfer under bankruptcy law. Chatham/Nu-Trax and Hamady declared bankruptcy in 1987.

Dandy then declared on his 1986 income tax returns the $7 million he had received for the sale of the option as a capital gain, thereby reducing the tax declared. However, he omitted from the return income he had received in the form of

kickbacks, payments by suppliers for personal services, and sham salaries paid to his son-in-law and his son's girl friend.

B.

On December 14, 1990, an indictment was returned charging defendant Dandy with tax evasion, willfully filing false returns, mail fraud, and bankruptcy fraud. On April 12, 1991, the grand jury returned a superseding indictment charging defendant in Counts 1 through 3 with tax evasion for the years 1982 through 1984 in violation of 26 U.S.C. § 7201; willfully filing false amended returns for 1982, 1983, and 1986 in Counts 4, 5 and 11 in violation of 26 U.S.C. § 7206(1); obstructing an IRS audit in Count 6 in violation of 18 U.S.C. § 1505; mail fraud in Counts 7 through 9 in violation of 18 U.S.C. § 1341; and bankruptcy fraud in Count 10 in violation of 18 U.S.C. §§ 152 and 2(b). Trial began on September 19, 1991, and concluded on November 20, 1991. The jury returned a verdict of guilty on all counts except Count 7 which had been dismissed by the district court. The district court sentenced defendant to a total of twenty-three years' imprisonment on May 22, 1992, and entered judgment on June 3, 1992. A timely appeal followed. On June 29, 1992, the district court entered a "Corrected Judgment." A timely appeal again followed.

II.

A.

Defendant Dandy argues that District Judge Cleland should have recused himself pursuant to Dandy's motion under 28 U.S.C. § 455(a) because of Judge Cleland's acquaintance with Douglas Mowat, President of London's Farm Dairy, and with certain members of the London family. We review a

district court's refusal to grant a motion for recusal for abuse of discretion. *Easley v. Univ. of Michigan Bd. of Regents*, 906 F.2d 1143, 1146 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1414 (1991).

Section 455(a) states that

> any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

First in chambers and then on the record on May 19, 1991, Judge Cleland informed the parties of his acquaintance with Mowat and the London family. He explained that he had a casual acquaintanceship with Douglas Mowat, an executive of London's, in that he had seen him at community functions, dinners, and fundraisers over the years. However, Judge Cleland stated he had not seen Mowat in over two years, had never been to Mowat's home, and Mowat had never been to his home.

Judge Cleland also stated he had been acquainted with the London family for close to thirty years and that a senior member of the London family, who is no longer associated with London's Farm Dairy, was an "across the street neighbor" when Judge Cleland was in college and law school. He also stated that while he was a prosecuting attorney for St. Clair County, Michigan, Mr. Mowat and "others from the London organization" may have contributed $10 to $20 apiece to his campaign. J.A. 698-700.

A district court judge must recuse himself where "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be

questioned. This standard is *objective* and is not based 'on the subjective view of a party.'" *United States v. Nelson*, 922 F.2d 311, 319 (6th Cir. 1990)(citations omitted; emphasis in original), *cert. denied*, 111 S. Ct. 1635 (1991). Where the question is close, the judge must recuse himself. *Roberts v. Bailar*, 625 F.2d 125, 129 (6th Cir. 1980).

Defendant has sought to characterize Judge Cleland's relationship with the London family as a lifetime friendship. However, Judge Cleland's disclosure reveals that his relationship with the London family and with Douglas Mowat is merely that of an acquaintance, not an intimate, personal relationship or a relationship in which Judge Cleland would be obligated to the London family or to Mowat. *Cf. In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1988). In this case, Judge Cleland was not called upon to evaluate the credibility of Mowat because defendant Dandy was tried by a jury. Furthermore, Mowat was simply one of many government witnesses and did not have a personal stake in the outcome which might have influenced Judge Cleland. [1] *Cf. Hadler v. Union Bank and Trust Co. of Greensburg*, 765 F. Supp. 976, 979 (S.D. Ind. 1991).

Finally, defendant argues that London's was considered by Judge Cleland to be a victim of defendant's crime and that because of his relationship with the London family there is an appearance of partiality in favor of one of the executive officers of London's. Defendant refers to a statement that Judge Cleland made at sentencing in which he said that defendant had "financially seduced merchants." J.A. 764. It is not at all clear from the record that Judge Cleland was referring to London's. Nevertheless, even if he were, the

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[1] The government in its brief states that Mowat was one of 56 witnesses.

London Dairy Farm was not a victim in the sense that it suffered injury, *i.e.*, it received more business as a result of its agreement to make personal payments to defendant. In any event, Judge Cleland's relationship with the London family and Mowat was not of a sufficiently intimate degree to induce a reasonable person with knowledge of all the facts to conclude that Judge Cleland's impartiality could be reasonably questioned.

**B.**

Defendant Dandy argues that the district court erroneously deprived him of his right to confront witnesses guaranteed by the Sixth Amendment by limiting his cross-examination of several witnesses and by admitting hearsay statements made by witnesses defendant was unable to cross-examine. However, defendant has mischaracterized what actually occurred at trial and the reasons for which the district court limited cross-examination. In most cases, the district court limited cross-examination or recross-examination because the questions went beyond the scope of direct or redirect examinations. The district court, however, gave defendant the opportunity to call these witnesses himself.

Defendant also argues that the district court erred in allowing hearsay into evidence. At trial, Sylvia Sophiea, a former church secretary who occasionally took messages for defendant Dandy's friend, Father Kalekas, testified for the government. The government asked her about one occasion when she told Father Kalekas that defendant had telephoned him: "Did Father Bill give you any directions at that time concerning Mr. Dandy?" J.A. 346. Sophiea's answer was that Father Kalekas had angrily replied, "[T]ell him to get off my back and get himself another patsy." J.A. 354. Defense counsel objected on the basis of hearsay. The government

argued that it was not hearsay because it was not introduced for the purpose of proving the truth of a matter asserted. Rather, it was offered to establish a breakdown in the relationship between defendant and Father Kalekas. The district court expressed doubt that the statement was in fact heresay; however, it eventually admitted the statement on the basis that it fell under the exited utterance exception to the hearsay rule. The court later denied defendant's motion for reconsideration stating simply that defendant had presented the same issues for reconsideration previously ruled upon by the court.

The government continues to assert that the statement at issue is not hearsay in that it was not offered to prove the truth of the matter asserted. *See United States v. Ellzey*, 874 F.2d 324, 330 (6th Cir. 1989). Relying on *United States v. Cruz*, 805 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1006 (1987), the government argues that an instruction such as the one given by Father Kalekas to Sophiea is not an assertion capable of being true or false and therefore cannot constitute hearsay. In *Cruz*, a law enforcement officer testified that he had asked one Jeanne Berry to introduce him to her supplier of cocaine. Berry later brought defendant to meet the officer, and thus the officer's statement was highly relevant because one could infer from his statement and Berry's subsequent action that the defendant was Berry's supplier. *Id.* at 1477. The Eleventh Circuit held that this out-of-court-statement was not hearsay because (1) it was not an assertion capable of being true or false, and (2) the statement was offered solely for the fact that it was made and the effect it had upon the hearer. *Id.* at 1478.

Defendant is correct in arguing that *Cruz* differs from this case in that Father Kalekas' statement was not offered in order to show the effect that it had upon its hearer, Sophiea.

However, the fact remains that Father Kalekas' statement was not offered to prove the truth of the matter asserted. In fact, as previously discussed, his statement was not an assertion. *See United States v. Gibson*, 675 F.2d 825 (6th Cir. 1982), *cert. denied*, 459 U.S. 972 (1982). Rather, the relevance of this statement lies in the fact that what was said indicated a breakdown in the relationship between Father Kalekas and defendant. Therefore, the district court did not abuse its discretion in admitting the statement. In this connection, we stated in *United States v. Hathaway*, 798 F.2d 902, 905 (6th Cir. 1986), that

> when a statement is offered to prove neither the truth nor falsity, there is no need to assess the credibility of the declarant. The significance lies entirely in the fact that the words were spoken. Thus, the statement does not fall within the Rule 801(c) definition of hearsay nor would the purposes of the hearsay rule be served by treating it as hearsay.

Thus, since the statement at issue does not constitute hearsay, it is unnecessary for us to consider whether the statement complies with the excited utterance exception to the hearsay rule.

Defendant next argues that the district court erred in allowing a statement by Wendell Smith, President of Chatham/Nu-Trax, that he knew the price of dairy products at London's rose after defendant took control of Chatham/Nu-Trax because "[t]he people in the dairy department [London's] said that the price of milk had gone up." J.A. 433. Defendant objected to this statement on the grounds of hearsay at trial, and the government agreed. The government also stated that the statement was not offered to prove the truth of the matter

asserted and suggested that the district court may wish to give a limiting instruction. In its brief, the government argues that the statement "was offered only to show what Mr. Smith's state of mind was — an issue relevant to Smith's acquiescence in Dandy's scheme to sell the worthless stock option." Government's Brief at 24. The district court responded to the government's suggestion that it give a limiting instruction by stating that "such an instruction is not necessary under the circumstances and the evidence that we have in hand already unchallenged." J.A. 434.

We do not see how the statement at issue is relevant to Smith's acquiescence in Dandy's plan to sell Chatham/Nu-Trax's stock option; nor is it clear how Smith's acquiescence to the plan was relevant in proving defendant's guilt or innocence of the offenses for which he was charged. In any event, a review of the record reveals that the statement was offered to prove that the price of London's milk rose after defendant Dandy took over Chatham/Nu-Trax. Thus, it was inadmissible hearsay. Nevertheless, Mr. Mowat had already testified at the trial that London's prices had risen when defendant Dandy became involved in London's. Therefore, we find that the admission of Smith's statement into evidence constituted harmless error because, as the district court found, evidence of defendant's effect on London's milk prices had already been admitted and was uncontradicted by any other witness. [2] *See Ellzey*, 874 F.2d at 330.

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[2] Defendant states that Mowat's testimony was "hotly contested"; however, defendant cites to no other witnesses who disputed Mowat's testimony. Rather, defendant focuses on Mowat's credibility as a witness.

## C.

Defendant Dandy argues that the government engaged in prosecutorial misconduct which warrants a reversal of his conviction. Defendant cites no fewer than twenty instances of alleged prosecutorial misconduct which took place over the ten-week trial. These instances can be group into five categories: (1) inflammatory language which prejudiced the jury against defendant, (2) gestures and facial expressions calculated to be prejudicial to defendant, (3) interjection by government counsel of himself as a witness at trial and asking questions without a factual basis, (4) interruptions designed to disrupt defense counsel, and (5) improper comments on the evidence.

Prosecutorial misconduct warrants reversal of a conviction only if it "permeates the entire atmosphere of the trial." *United States v. Cummins*, 969 F.2d 223, 227 (6th Cir. 1992). Determining whether an error is reversible requires a review of the record as a whole. *United States v. Solivan*, 937 F.2d 1146, 1155 (6th Cir. 1991). Factors to consider are the strength of the evidence against the defendant, the potential for prejudice to the defendant, and the timing and firmness of the district court admonition, if any. *Cummins*, 969 F.2d at 227; *Solivan*, 937 F.2d at 1157. Where the government's conduct is, in fact, unconstitutional, "[i]t is incumbent upon the government to demonstrate that such constitutional error, resulting from the admission of highly prejudicial evidence or comment, is harmless beyond a reasonable doubt." *Solivan*, 937 F.2d at 1155.

A review of the record reveals that this was a heated trial and that emotions ran high on each side. The district court cautioned counsel for both the defense and the government regarding potentially prejudicial conduct such as

excessive facial expressions, gestures, gasps, and loudly whispered conversations between attorneys seated at counsel's table. In each case where the prosecutor became too zealous, the district court acted promptly to respond to the defense's objections and admonish the prosecutor.

As previously stated, defendant argues that the prosecutor interjected himself as a witness in the trial and asked questions for which there was absolutely no factual basis. At trial, the prosecutor attempted to question defense witness Norris Toney, a former commissioner with the Human Relations Commission of the City of Flint where he worked to raise money to assist people in the community, regarding whether he had delivered money for a Mr. Barge, his then supervisor, to a General Motors supervisor.

> Question: You never delivered any payments of any money for him [Mr. Barge] to GM officials?
>
> Answer: No.
>
> . . .
>
> Question: Well, you did, in fact, testify about that, didn't you, sir?
>
> Answer: Yes, I did.
>
> . . .
>
> Question: Is that not true, sir? Mr. Toney, did you not testify that you delivered money from Warren Barge to a General Motors supervisor?
>
> Answer: No.

J.A. 610.

Defendant argues that the government had absolutely no factual basis with which to question defense witness Toney regarding a delivery of money to a General Motors supervisor. In *United States v. Brown*, 519 F.2d 1368, 1370 (6th Cir. 1975), we held that the government committed reversible error by questioning a witness regarding previous testimony in another court proceeding where the records of the trial provided no basis for the government's questions. Later in the proceedings in this case, however, and out of the presence of the jury, witness Toney did in fact admit that he had delivered money from Barge to a General Motors supervisor. J.A. 615. [3] Thus, a factual basis did exist for the prosecutor's questions.

Defendant also objects to certain questions the government asked of Toney regarding his relationship with one Mattie Fordham. The prosecutor asked Toney if he were aware that Ms. Fordham, with whom he worked on the Human Relations Commission, had pled guilty to a federal crime and had been convicted of a federal crime. *These questions were not asked in front of the jury, but defendant moved for a mistrial.* At a later hearing on this motion, the prosecutor stated that a search of his records revealed that Ms. Fordham had not been convicted of a federal crime but that several years earlier he had agreed to put Ms. Fordham in a pretrial conversion program because of her misapplication of the Human Relations Commission's funds. The prosecutor also stated that a search of his records revealed he had prosecuted several of Ms. Fordham's family members for federal crimes. Because the jury never heard this line of questioning, it could not have prejudiced the jury against

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[3] Toney stated that he did deliver money to a Don Anderson, a GM supervisor, "for the purpose of his house." J.A. 615.

defendant, and, therefore, even though the prosecutor's questions were improper, they do not warrant a reversal.

Defendant also argues that in his closing argument, the prosecutor, while vouching for a witness's credibility, made highly prejudicial comments which warrant reversal. The following took place during the government's closing argument:

> Prosecutor: But Mr. McColgan is an honest man, he told the truth to the FBI and he told the truth to you. . . .
>
> Defense Counsel: Your honor, I'm going to object to the prosecution vouching for the credibility of the witness, giving his opinion as to the credibility of the witness.
>
> The Court: There may be merit to that objection, Mr. Haveland [sic]. The argument should be restricted to the evidence and reasonable inferences from the evidence.
>
> Prosecutor: Your Honor, this is all the evidence. This is the testimony of Mr. McColgan.
>
> The Court: Let me clarify that any assertions that are made from evidence, inferences from precise evidence and — continue with your argument — [sic] distinguishing the merits of the objections just raised.
>
> Prosecutor: Well, to make it clear, ladies and gentlemen, everything I am telling you is based

> on the evidence in this case. If you don't remember it the way I am saying it, disregard what I say. Rely on what you heard. I believe Mr. McColgan told you that he had told the truth to the FBI when he was interviewed by Agent Clemmer on two or three occasions in previous years. He admitted to Agent Clemmer that he had, indeed, paid this kickback. He was subpoenaed to testify in this case, he was under oath, he told you he didn't lie to anyone and he wasn't lying to you.
>
> And my point is why would he lie about this? If there were any incentive on his part to lie, it would have been to deny that he had paid a kickback.

J.A. 744-46.

It was improper for the prosecutor to state that Mr. McColgan is honest. Such a statement conveys a conviction of personal belief regarding the witness's veracity. *See United States v. Bess*, 593 F.2d 749, 755 (6th Cir. 1979) ("expressions of personal belief of innocence or guilt of an accused are error"). However, the district court immediately instructed the jury that all assertions are to be made from the evidence. The prosecutor then told the jury to "disregard what I say" if it did not find his statements based on the evidence. J.A. 745. Moreover, while the prosecutor's statement was improper, it was not as egregious as it might have been had the prosecutor used the phrase "I believe" that Mr. McColgan is honest. *Cf. Bess*, 593 F.2d at 757 (holding that prosecutor's misconduct constituted reversible error where the prosecutor stated "I believe beyond a reasonable doubt" that the defendant was guilty and the district court failed to

give immediate curative admonishment). Given the degree of egregiousness of the prosecutor's statement, the weight of the evidence against defendant, and the district court's immediate curative instruction to the jury, the prosecutor's misconduct did not constitute reversible error. *See United States v. Krebs* 788 F.2d 1166, 1177 (6th Cir. 1986), *cert. denied*, 479 U.S. 930 (1986)(holding that prosecutor's statement "I want to suggest to you that in this trial testimony she was telling the truth" did not constitute reversible error given the substantial evidence against the defendant and the trial court's corrective measures to eliminate prejudice).

**D.**

Defendant Dandy argues that he was deprived of a fair trial by the district court's questioning of witnesses and commenting on the evidence. In *United States v. Slone*, 833 F.2d 595, 597 (6th Cir. 1987), we stated:

> The presiding judge should conduct a trial in an orderly way with a view to eliciting the truth and to attaining justice between the parties. He must see that the issues are not obscured and that the testimony is not misunderstood. The trial court has the right to interrogate witnesses for this purpose.
>
> The presiding judge, however, must be careful to "'always be calmly judicial, dispassionate and impartial. He should sedulously avoid all appearances of advocacy as to those questions which are ultimately to be submitted to the jury.'" "'The basic requirement is one of impartiality and demeanor as well as in actions.'"

(Citations omitted.) We also noted three instances in which a district court "has good reason to interject himself into the trial." *Id.* First, judicial intervention may be necessary for clarification in a lengthy and complex trial. Second, it may be necessary for clarification where attorneys are unprepared or obstreperous or if the facts are becoming confused and neither side is able to resolve the confusion. Third, judicial intervention may be necessary if a witness is difficult or if the witness's testimony is not credible and the attorney fails to adequately probe the witness or if the witness becomes inadvertently confused. *Id.; see also United States v. Blakeney*, 942 F.2d 1001, 1013 (6th Cir.), *cert. denied*, 112 S. Ct. 646 (1991) *and* 112 S. Ct. 881 (1992); *United States v. Seago*, 930 F.2d 482, 492 (6th Cir. 1991).

Defendant's argument is meritless. First, the district court did engage in lengthy questioning of a witness regarding the definition of the terms "backdating," "imputed interest," and "net operating loss carryover." J.A. 408-417. Defendant objected on the grounds that the district court's inquiry into those areas "gives an impression to the jury that the Court feels that these particular areas are more important than the other areas." J.A. 420. The district court noted defense counsel's objection and then gave a long cautionary instruction to the jury not to form an opinion regarding the case simply on the basis that the court had asked these questions.

Second, one juror submitted a question asking, "Why would you have included payments to Kirdassi as income to Mr. Dandy when the W-2 was made out to Kirdassi." J.A. 447. Defendant objected on the grounds that the prosecution's theory was once again being emphasized to the prejudice of the defendant. The district court then asked a series of questions designed to answer the juror's question.

Third, the court questioned a witness regarding the difference between a gift and a bribe. Defendant objected on the grounds that the question highlighted the government's case, was prejudicial, and gave the jury the impression that the district court was prejudiced against defendant. Defendant also now argues that the questions were prejudicial because the witness, an IRS agent, testified that any business entertainment given by one business to another business over $25 had to be reported as income by the recipient, and if it was not, then the IRS treated it as a bribe.

As we have stated in *Slone*, "[t]he fact that testimony elicited by the trial judge may have damaged appellant's case, does not automatically cast the court in the improper role of surrogate prosecutor." 833 F.2d at 600 (citation omitted). This was a long and complicated case conducted over a period of ten weeks and involving difficult concepts. The district court was justified in reviewing those difficult concepts which were crucial to the disposition of the case. From the record, it is apparent that when initially presented by the witnesses, many of these concepts were not fully explained in terms that a layman could understand.

Moreover, the questions were stated in a neutral manner. The court did not interrupt examination by either party's counsel and gave defense counsel an opportunity for follow-up after it asked questions. In addition, as previously mentioned, the district court at one point gave a lengthy cautionary instruction to the jury. Therefore, we conclude that the district court's questioning did not deprive defendant of a fair trial. *See Slone*, 833 F.2d at 600-601 (holding that the district court did not act improperly by asking witness questions where it did not interfere with defendant's cross-examination rights, court gave the opportunity for follow-up questions, asked questions for the purpose of clarification, and

gave a cautionary instruction to the jury). In addition, the district court's occasional summary of the witness's explanations was not improper. "A federal judge may analyze the evidence, comment upon it, and express his views with regard to the trial testimony and the witnesses." *United States v. Murdock*, 290 U.S. 389, 394 (1933), *overruled on other grounds, Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964); *see also Blakeney*, 942 F.2d at 1013 (holding that a district court may "analyze and dissect the evidence, as along as the district judge does not distort or add to it"). In this case, the district court was careful to comment and summarize in a neutral manner for the purpose of clarification, neither adding to nor distorting the evidence.

E.

Defendant Dandy argues that Counts 1 and 2 of the superseding indictment charging tax evasion under 26 U.S.C. § 7201 are time-barred under the applicable statute of limitations and that insufficient evidence exists to support his conviction on these counts. Counts 1 and 2 of the original indictment allege tax evasion occurring on June 13, 1983, and July 3, 1984, the dates on which the income tax returns for tax years 1982 and 1983 were filed. 26 U.S.C. § 6531 provides a six-year statute of limitations period for tax evasion, and the original indictment was filed on December 14, 1990, more than six years after the tax returns were filed. However, the government filed a superseding indictment alleging that *acts of evasion* relating to tax years 1982 and 1983 occurred through November of 1985. Defendant argues that the statute of limitations began to run for each count on the date that each tax return was filed. The government argues, however, that the statute of limitations for each count of tax evasion began to run only when the last affirmative act

of evasion occurred, thus bringing Counts 1 and 2 within the six-year statute of limitations period.

In *United States v. Hook*, 781 F.2d 1166, 1173 n.9 (6th Cir.), *cert. denied*, 479 U.S. 882 (1986), we declined to decide whether the limitations period begins to run when income tax returns are filed or due or whether the limitations period begins to run at the last affirmative act of evasion in furtherance of the crime. However, the two circuits which have addressed this specific issue have held that it is the date of the latest affirmative act of evasion that triggers the statute of limitations. *See United States v. Winfield*, 960 F.2d 970, 973 (11th Cir. 1992)(per curiam); *United States v. Ferris*, 807 F.2d 269, 271 (1st Cir. 1986), *cert. denied*, 480 U.S. 950 (1987). We adopt the First and Eleventh Circuits' approach to this issue because to hold otherwise would only reward a defendant for successfully evading discovery of his tax fraud for a period of six years subsequent to the date the returns were filed. For example, in this case, defendant's evasive acts in 1985 prevented the IRS from learning about defendant's income tax fraud occurring in 1982 and 1983.

Defendant relies on *United States v. Habig*, 390 U.S. 222 (1968), to support his argument that the statute of limitations should begin to run at the time the return is filed. In *Habig*, the Supreme Court held that the statute of limitations for an attempt to evade taxes by filing a false return under 26 U.S.C. § 7201 began to run on the date that the returns were actually filed, not the date that they were due to be filed. The Court determined that to hold otherwise would be to accept the argument that "Congress intended the limitations period to begin to run before [defendants] committed the acts upon which the crimes were based." *Id.* at 225.

*Habig* actually supports the position that the statute of limitations for income tax evasion alleged in Counts 1 and 2 in this case did not begin to run until the last affirmative evasive acts occurring sometime in November of 1985. This conclusion is so because it is these evasive acts, occurring within six years of the superseding indictment, which form the basis of the crimes alleged in Counts 1 and 2 of the superseding indictment. Finally, this result seems reasonable when one considers the fact that had it not been for defendant's evasive acts in 1985, the IRS would very likely have discovered defendant's income tax fraud occurring in 1982 and 1983. To hold that the statute of limitations for income tax evasion occurring in 1982 and 1983 began to run on the date the returns were filed would reward defendant for successfully evading discovery of his tax fraud for a period of six years subsequent to the date the returns were filed.

Defendant next argues that evidence of affirmative acts of evasion within the statutory period is insufficient to sustain his conviction on Counts 1 and 2. This issue is reviewed on appeal from the district court's ruling on either a motion for a new trial or a motion for judgment not withstanding the verdict. *Dixon v. Montgomery Ward*, 783 F.2d 55 (6th Cir. 1986). Defendant does not claim nor does the record reveal that defendant has made either motion. Therefore, we decline to consider this issue.

F.

Defendant Dandy argues that his conviction on Count 8 for mail fraud in violation of 18 U.S.C. § 1341 must be reversed because it was based on a theory not recognized in this circuit nor alleged in the indictment. Specifically, defendant argues that the indictment sets forth a constructive trust theory which is inadequate to sustain his conviction for

mail fraud. Under the constructive trust theory, any economic benefit acquired by a fiduciary as a result of a breach of his fiduciary duty owed to a principal is held in trust for the principal. *United States v. Runnels*, 833 F.2d 1183, 1188 (6th Cir. 1987), *vacated on other grounds*, 877 F.2d 481 (6th Cir. 1989). The constructive trust theory does not require that the *principal* has suffered some actual economic loss, simply that the *fiduciary* has benefitted economically from his breach. *Id.* at 1187.

The superseding indictment charges that defendant "devised and executed a scheme and artifice to defraud Nu-Trax, Inc., d/b/a Chatham Super Markets, by obtaining money which by law should have been paid or credited to an account of Nu-Trax, Inc." The district court instructed the jury that the director of a corporation is a fiduciary of the corporation and that it is his duty to make the best bargains possible for the corporation and that any property received from transactions he conducts on the corporation's behalf belong to the corporation. The district court also instructed the jury that it was not sufficient that defendant may have simply breached his duty toward the corporation, unless that breach involved money or property belonging to or required to be delivered to the corporation.

In this case, the indictment and the jury instructions make it clear that the defendant could not be found guilty of mail fraud simply on the basis that defendant as a fiduciary profited from his breach of his fiduciary duty. Rather, as the Supreme Court indicated in *McNally v. United States*, 483 U.S. 350, 360 (1987), Chatham/Nu-Trax must have suffered a specific property loss above and beyond that created by defendant's fiduciary duty to the corporation. Here the evidence was that London's Farm Dairy would have charged Chatham/Nu-Trax lower prices for milk had it not been for

the kickbacks they had to pay to defendant. Because the indictment, evidence, and jury instructions are all based on concrete economic harm to Chatham/Nu-Trax, defendant's argument must fail. *See United States v. Asher*, 854 F.2d 1483, 1494 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989)("those cases that have *sustained* mail fraud convictions have done so where the 'bottom line' of the scheme or artifice had the inevitable result of effecting monetary or property losses to the employer or to the state.").

G.

Defendant Dandy argues that his conviction on Count 9 for mail fraud in violation of 28 U.S.C. § 1341 must be reversed because the indictment alleges that defendant engaged in a scheme to defraud the "future" creditors of Chatham/Nu-Trax. According to defendant, a future creditor has no tangible property interest and thus has no enforceable property right under the mail fraud statute. However, Count 9 of the superseding indictment alleged that defendant defrauded Chatham/Nu-Trax *and* its future creditors. In its instructions to the jury on Count 9, the district court instructed the jury that it must find the defendant defrauded Chatham/Nu-Trax. It did not refer to future creditors. Therefore, the jury could not have convicted defendant on Count 9 unless it found defendant had defrauded Chatham/Nu-Trax, and thus, it is unnecessary for us to consider defendant's argument in regard to future creditors. *See United States v. Ochs*, 842 F.2d 515, 520 (1st Cir. 1988).

Defendant also argues that his conviction under Count 9 must be reversed because the district court instructed the jury to consider defendant's status as a fiduciary in determining whether defendant had defrauded Chatham/Nu-Trax under Count 9. However, the indictment alleged that

defendant defrauded Chatham/Nu-Trax of $7 million in assets which belonged to the company. These assets are concrete property interests, and simply because defendant possessed a fiduciary relationship to Chatham/Nu-Trax which enabled him to defraud the company of $7 million in assets does not render his conviction invalid. *See McNally*, 483 U.S. at 360.

**H.**

Defendant Dandy argues that the district court committed reversible error in refusing to instruct the jury that repayment is a factor to be considered in determining whether a particular transaction is a loan. At issue on Counts 1 through 5 was whether the payments defendant received from Hamady constituted taxable income or loans. Defendant's theory of defense was that the payments were loans and defendant offered as evidence of this theory the fact that defendant eventually repaid the money to Hamady. The district court simply instructed the jury that it must consider whether any funds received by defendant constituted ordinary income or loans and that it must consider all circumstances surrounding such payments.

It is reversible error not to present a defendant's theory of defense adequately in a full statement of the law. *United States v. Duncan*, 850 F.2d 1104, 1118 (6th Cir. 1988). However, the district court did fully present defendant's theory of defense to the jury by explaining that it must determine whether the money given from Hamady to defendant was income or a loan. The fact that defendant eventually repaid the money to Hamady is evidence which the jury may consider in determining whether the money was a loan or income, but it is not a legal theory standing alone. Therefore, the district court's refusal to give defendant's specific instruction was not error. *See id.*

## I.

The government agrees with defendant Dandy that the district court lacked jurisdiction to file its "corrected judgment" more than seven days after it entered the original judgment. Federal Rule of Criminal Procedure 35(c) authorizes the district court to correct its judgment for clerical errors only within seven days after the sentence was imposed. The original judgment stated that the term of the sentence "ought to be served consecutively under the provisions of 18 U.S.C. § 4205(a) which provides that defendant shall be eligible for parole at such date as the parole commission may determine." However, former 18 U.S.C. § 4205(a), which is applicable to this case, provided that "a prisoner shall be eligible for release on parole after serving one-third of such term or terms . . . ." The corrected judgment states that the terms of the sentence "shall be served consecutively under the provisions of 18 U.S.C. § 4205(a)." It appears that the district court made a simple error and attempted to correct it. Therefore, the corrected judgment should be vacated and the original judgment be remanded to the district court in order to resolve the contradiction as to defendant's parole eligibility date.

## III.

For the reasons stated, the June 29, 1992, corrected judgment of the district court is VACATED, and the June 3, 1992, judgement of the district court is REMANDED to the district court for the purpose of correcting the judgment in order that it conforms to the express intentions of the district court as stated at sentencing and with the language of former 18 U.S.C. § 4205(a) as it applies to defendant. In all other respects, the district court is AFFIRMED.

**APPENDIX B**

FILED
AUG 11, 1993
LEONARD GREEN, Clerk

Nos. 92-1702/1840

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellee, | ) | |
| v. | ) | ORDER |
| ALEX DANDY, Defendant-Appellant. | ) | |

BEFORE: MILBURN and RYAN, Circuit Judges; and COFFIN, Senior Circuit Judge.*

The court's opinion in this case is amended by deleting the last paragraph under Part II.E. and substituting therefor the following:

> Defendant next argues that the evidence is insufficient to sustain his conviction on Counts 1 and 2. In this case, although defendant made a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29 at the close of the government's case and at the close of all the evidence, defendant never argued to the district court that the evidence was insufficient on Counts 1 and 2. Following the close of the government's

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* Honorable Frank M. Coffin, Senior Circuit Judge, United States Court of Appeals for the First Circuit, sitting by designation.

case, defendant's counsel made the following argument to the district court, merely reasserting his pretrial motion to dismiss on statute of limitations grounds:

MR. ROTATORI: Okay, your Honor, with regard to Counts 1 and 2, I think we can take them together and save time because the argument for both are [sic] the same.

With regard to Counts 1 and 2, the defendant in support of its motion for a judgment of acquittal pursuant to Rule 29, incorporates by reference, the legal memorandum submitted to the Court when the defendant moved to dismiss Counts 1 and 2 based upon the statute of limitations.

THE COURT: So you have a statute of limitations issue which is — which we have roundly discussed, and I have denied.

And is there any additional basis found within the evidence here at trial or lack — asserted lack of evidence with regard to any points in that case?

MR. ROTATORI: Substantively we have no Rule 29 motion with regard to Counts 1 —

THE COURT: Procedurally you wish to reiterate your motion — I don't even know it's necessary to do that, but in an abundance —

> MR. ROTATORI: Just briefly. At the time we made the motion prior to trial, we did not have the testimony of, I think, the most critical witness with regard to the government's position that the statute of limitation was extended with regard to Counts 1 and 2 because of the allegation in the superseding indictment . . . .

Trial transcript, Vol. XVII at 143-145. Defendant's counsel then proceeded to argue that there was insufficient evidence to support the conviction on Count 6, charging obstruction of justice, and that the failure of that charge would require dismissal of Counts 1 and 2.

> At the close of all evidence, defendant's counsel stated:
>
> MR. LORD: We would make a general renewal of our Rule 29 motions at the end of the case.
>
> THE COURT: So noted.
>
> MR. LORD: I would make a specific renewal as to two particular counts.

Defendant's counsel then made specific arguments that the evidence was insufficient on Counts 6 and 7. Trial transcript, Vol. XXXVI at 9-11 (emphasis added). The district court then rejected defendant's challenges to the sufficiency of the evidence on Count 6, and defendant has not contested that ruling in this appeal.

This court will not entertain a defendant's challenge to the sufficiency of the evidence on appeal unless the defendant moved for a judgment of acquittal under Rule 29 at the close of the government's case-in-chief and at the close of all the evidence. *United States v. Williams*, 940 F.2d 176, 180 (6th Cir.), *cert. denied*, 112 S. Ct. 666 (1991). Such a failure to make the required Rule 29 motions constitutes a waiver of an objection to the sufficiency of the evidence. *Id.* Although specificity of grounds is not required in a Rule 29 motion, *see, United States v. Gjurashaj*, 706 F.2d 395, 399 (2d Cir. 1983), where a Rule 29 motion is made on specific grounds, all grounds not specified are waived:

> However, where as here a motion for acquittal is made on specified grounds which do not include any objection to venue, we think that objection has been waived. The specification of grounds in the motion is an indication that counsel has evaluated the record and has these particular reasons for his motion. His omission of venue from those reasons is similar to a general failure to move for acquittal in spite of the government's failure to provide any substantial evidence to support the alleged venue. In the latter circumstances, the Sixth Circuit found the objection waived, *United States v. McMaster*, 343 F.2d 176, 181 (6th Cir.), *cert. denied*, 382 U.S. 818, 86 S. Ct. 42, 15 L.Ed.2d 65 (1965); *cf. United States v. Michelson*, 165 F.2d 732, 734 (2d Cir.)(dictum), *aff'd*, 335 U.S. 469, 69 S. Ct. 213, 93 L.Ed. 168 (1948).

> The Ninth Circuit has found waiver where the defendant made a motion to acquit on specific grounds and did not mention venue. *Gilbert v. United States*, 359 F.2d 285, 288 (9th Cir.), *cert. denied*, 385 U.S. 882, 87 S. Ct. 169, 17 L.Ed.2d 109 (1966); *United States v. Brothman*, 191 F.2d 70, 72-73 (2d Cir. 1951)(dictum). We think this the proper result. It is not unreasonable to expect the defendant to make some reference to the venue point in order to save his objection for appeal. Where he moves to acquit without specification, we might assume venue to be included among his unarticulated disagreements with the conduct of the case, but where he does specify grounds for the motion and omits mention of venue we must conclude that he cannot be considered to have raised a question concerning the place of the trial. Since there can be no doubt that Rivera did move for acquittal on specific grounds without mention of improper venue at that time, he waived any objection he may have had.

*United States v. Rivera*, 388 F.2d 545, 548 (2d Cir.), *cert. denied*, 392 U.S. 937 (1968).

From the record, it appears that defendant's Rule 29 motion did not challenge the sufficiency of the evidence. After being directly asked by the court whether he challenged the sufficiency of the evidence, defendant's counsel replied that he did not. Moreover, the foregoing authorities make it clear that because defendant asserted specific grounds for his Rule 29 motion, viz., the statute of limitations, defendant has

waived all other grounds. Further, at the close of all the evidence, defendant merely adopted his previous motion, which we have found inadequate. Therefore, we hold that defendant has waived his challenge to the sufficiency of the evidence on Counts 1 and 2.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

**APPENDIX C**

Received Jun 3 1991

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF MICHIGAN**
**NORTHERN DIVISION**

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UNITED STATES OF AMERICA,
Plaintiff,

v. Case No: 90-CR-50048-BC
90-CR-50054-BC

ALEX DANDY,
Defendant.
_____/

ORDER DENYING DEFENDANT'S
MOTION FOR DISQUALIFICATION

This matter is before the court on defendant's motion for disqualification pursuant to 28 U.S.C. § 455(a). Based on the motion and accompanying documents, the court finds that a reasonable person with knowledge of the facts presented would not conclude that the judge's impartiality would reasonably be questioned. Defendant's motion is therefore DENIED.

The underlying criminal complaint against the defendant contains, among others, charges that he violated the mail fraud statutes by engaging in a scheme to defraud NU-TRAX, INC. Defendant was Chairman of the Board of Directors of NU-TRAX. The indictment alleges defendant, for the privilege of allowing them to do business with NU-TRAX, required London's Farm Dairy, Inc. (London's), to pay kickbacks to Michigan Milk Movers, Inc., of which

defendant was sole shareholder. The government's theory is that defendant engaged in a scheme to defraud NU-TRAX, INC. by means of false pretenses and misrepresentations and that he used the mails, at least in part, to execute the scheme.

First in chambers and then on the record on May 19, 1991, this judge informed the parties that London's had its origins and maintained its corporate base in Port Huron, Michigan, and that, since he was a Port Huron native, it may be no surprise that he has been an acquaintance of certain members of the London family and a few London's Farm Dairy executives. Particularly, the court noted that, although they were merely acquaintances, Mr. Douglas Mowat, an executive in the corporation, was not only known to him, but also may well have been among the several hundred people who had contributed $10 or $20 to his campaign for re-election as St. Clair County Prosecutor in the mid-to-late 1980's. The government then confirmed the court's initial impression that Mr. Mowat would be a witness at Mr. Dandy's trial.

Based on this information, defendant moved for disqualification. The government has responded and the motion is ripe for review.

28 U.S.C. § 455(a) provides that "any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might be questioned." The legal standard to be applied to a motion for disqualification under this section is well established in the Sixth Circuit:

> A district judge is required to recuse himself "only if a reasonable person with knowledge of all the facts would conclude that the judge's

> impartiality might reasonably be questioned." This standard is objective and is not based "on the subjective view of a party."

*United States v. Nelson*, 922 F.2d 311, 319 (6th Cir. 1991).

Defendant argues that during the course of trial the court will be called upon to rule regarding the admissibility of Mr. Mowat's testimony and possibly that of the owners of London's Farm Dairy. He contends that the court's longstanding relationship with such witnesses may have a conscious or unconscious impact upon the court's rulings. Defendant further contends that serious questions of impartiality may arise at and with regard to sentencing. Lastly, defendant contends that the court's relationship with these witnesses lends an "appearance of impropriety" to the proceedings.

The court finds defendant's arguments insufficient both in specificity and persuasiveness to warrant a grant of a disqualification motion.

Firstly, this case will involve a jury trial. Accordingly, the court will not be called upon to be a fact-finder, and to weigh the credibility of the potential witnesses — those will remain tasks for the jury. Secondly, although defendant has suggested that the court will have to make evidentiary rulings regarding Mr. Mowat's testimony, defendant has pointed to nothing to illuminate how the court's acquaintance with the witness could conceivably affect any rulings on evidence admissibility. The fact that the court knows Mr. Mowat, or were even considered a friend of his, is irrelevant to the issue of whether "similar act" or other evidence is admissible. The foundation or lack of it with respect to "404(b)" evidence must rise or fall upon the quality

of the evidence and the requirements of the law, not upon witness credibility determinations by the court. Thirdly, it is important to note that the indictment alleges that NU-TRAX, INC. was the corporation victimized by fraudulent activity . . . not London's corporately and not Mr. Mowat personally. While defendant's counsel, on the record on the 19th, suggested that there may exist personal animosity or litigation, or both, between Mr. Mowat and Mr. Dandy, and that that situation could be viewed objectively as a source of tension in the court's efforts to maintain neutrality, he presents nothing in his motion to even reiterate, let alone to substantiate that initial in-court assertion. Nothing is proposed by either the defense or the government that would demonstrate that London's or Mowat has any stake in the proceedings or anything at all to gain or lose from the outcome of this case.

Finally, defendant has suggested nothing as to how the court's acquaintance with Mr. Mowat could be a factor affecting sentencing should the jury return a verdict of guilty. This case is not one in which just one critical witness — Mowat — is the keystone to a successful sentencing argument brought by the government, with a favorable determination by the court of that witness's story spelling sentencing-guidelines doom for the defendant. Were that scenario even minimally suggested by the facts as made known to the court here, the result could arguably be different. The defendant, however, is silent on this feature of the case as well. Indeed, the Guidelines' leveling and objectifying effect itself denies wind to the sails of defendant's argument in this respect.

The defense here has presented a sensible and accurate dissertation on the state of the law in the area of disqualification, but provided little of substance in the pursuit of a fair and accurate determination of the issue in this case.

Based on the paucity of affirmative evidence presented, the court must determine that a reasonable person would not conclude that the court's impartiality would be questioned. Defendant's motion for disqualification must consequently be DENIED.

IT IS SO ORDERED.

/s/ ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

DATED: May 30th, 1991

## APPENDIX D

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202-3988 TELEPHONE
LEONARD GREEN (513) 664-2953
CLERK FTS 684-2953

August 11, 1993

Mr. Robert Haviland
Mr. Richard L. Stoper, Jr.

Re: Case Nos. 92-1702/1840
*USA v. Dandy*

Dear Counsel:

Upon consideration of the petition for rehearing en banc filed by the appellant in the above case, the hearing panel has issued the enclosed order.

In light of the panel's action, we ask that counsel for the appellant to determine whether the petition for en banc reconsideration is to be withdrawn. If it is not, the appellant shall have until Wednesday, September 1, 1993 to file a memorandum of law supplementing their original petition. Should the appellee wish to seek en banc reconsideration of the enclosed opinion, they may do so by filing no later than Wednesday, September 1, 1993 and appropriate petition conforming with the requirements of the Federal Rules of Appellate Procedure and the Rules of the Sixth Circuit. If this office does not hear from either party by the close of business on September 1, we will render the petition moot and no further action will be taken.

Any party filing an additional petition or memorandum should file twenty-five (25) copies of each document.

Very truly yours,

/s/ Leonard Green
Clerk

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**APPENDIX E**

FILED
SEP 15, 1993
LEONARD GREEN, Clerk

Nos. 92-1702/1840

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellee, | ) | |
| v. | ) | ORDER |
| ALEX DANDY, Defendant-Appellant. | ) | |

BEFORE: MILBURN and RYAN, Circuit Judges; and COFFIN,* Senior Circuit Judge.

The court having received a petition for rehearing en banc and its supplement based on the order amending the opinion, and the petition and supplement having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and its supplement and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

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* Hon. Frank M. Coffin, Senior Circuit Judge for the United States Court of Appeals for the First Circuit, sitting by designation.

## APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA

-vs- No. 90-20054-FL

ALEX DANDY, MOTION
Defendant.
_____/

Proceedings had and testimony taken in the above-entitled matter before the Honorable Robert H. Cleland, United States District Judge, at Bay City, Michigan, on the 14th day of May, 1991.

APPEARANCES:
STEPHEN MARKMAN, U.S. ATTORNEY
BY: ROBERT HAVELAND, AUSA,
AND THEODORE FOREMAN, AUSA,
Appearing on behalf of the Government
ROBERT ROTATORI, ESQ., and
WARREN J. PERLOVE, ESQ.,
Appearing on behalf of the Defendant.

* * *

THE COURT: Thank you.

Counsel both for the government and for the defense had a brief opportunity, roughly an hour ago, to discuss order of arguments and some other issues preliminarily in chambers and off the record.

At that time I notified both sides that I was acquainted with a person whom I since have been informed will be a witness in this case.

This individual's name is Douglas Mowat, who is an executive with London Farm Dairy, Inc. which is a Michigan corporation with its headquarters, as I'm informed, its headquarters in Port Huron, Michigan.

I hale from Port Huron, Michigan, maintain a home there and have been acquainted with various members of the London family over the course of twenty — closer, really, to thirty years.

I informed counsel that Glen London, one of the senior members of that family, was an across the street neighbor of my parents and myself when I was in college — up through the time I was in college and law school. To my knowledge he's no longer associated with the corporation, I think he's retired from that. I may be incorrect, but in any event I'm acquainted with a friend of his.

Additionally, I am acquainted with a Michigan State representative named Terry London, who is from the Port Huron metropolitan area, Marysville, Michigan. He's not, to my knowledge, in any way associated with the corporation but is a — I think he's a nephew of Glen London and his son or one of the other London brothers.

He's fulltime in public service, though, to the best of my knowledge.

Finally with respect to Douglas Mowat, this is an individual whom I have known for close to twenty years in one fashion or another, as he was working his way up through the corporate structure.

He and I, though we are on friendly acquaintance terms, have never socialized at one another's houses. We have commonly met, however, at community functions, dinners, testimonials, fund raisers and things of that nature over the course of years.

Before I took this job I was an elected official in St. Clare County, I was the prosecuting attorney of that county, and although I did not have political opposition in any of my campaigns, I did throw fund raiser celebrations annually. And although I'm not positive of it, I would expect that Mr. Mowat and probably his wife, quite likely others from the London organization, were contributors to my campaign to the tune of perhaps ten or twenty dollars apiece, something along those lines.

I expect that that was sporadic and not regular, and in no event do I think there was anything particularly significant about that — significant financially about any of that.

I think I haven't seen Mr. Mowat in well over a couple of years now and certainly have not had any discussion with him over the facts of this case during any of this time.

Nor do I think I have discussed his business with him at all, quite frankly. I have discussed community affairs perhaps from time to time but not anything about London Dairy.

Now, that in combination with the fact that I occasionally drink London's milk and eat London's ice cream puts the parties fully on notice, I think, as to — in terms of what the Court may personally have in the way of history on this affair.

I put it to defense counsel and to the government to react to this disclosure, and to let me know if either side

believes that there is anything that need be done by the Court with respect to these.

First of all, Mr. Haveland on behalf of the government, you told us in the previous discussion Mr. Mowat will indeed be a witness in this case, true?

MR. HAVELAND: That is correct, your Honor. I would like to amplify that slightly. He did testify at the grand jury and the defense has already gotten a copy of his grand jury testimony.

THE COURT: All right. Now, Mr. Rotatori?

MR. ROTATORI: Yes, your Honor. It's a bit more complicated for the defense. I believe Mr. Mowat is going to be the chief government witness with regard to at least one count on this indictment, and perhaps providing testimony with regard to other — which would be relevant to other counts in the indictment.

Additionally, I just found out from Mr. Dandy that apparently there was some civil litigation between Mr. Mowat and London Farm Dairy and Mr. Dandy and Hamady Brothers Food Centers.

Of course, this is the first time that this subject has been broached to Mr. Dandy, we would beg the Court's indulgence to have a day or two before we respond to the Court with regard to this issue.

THE COURT: Can we legitimately make any progress with the motions that are scheduled for progress this afternoon, counsel, without resolution of this issue?

MR. ROTATORI: I would guess not, now if the Court —

THE COURT: That's why I wanted to handle this right at the beginning, counsel.

MR. ROTATORI: I appreciate the Court's concern, and I would agree with the Court. I mean, if it is of the nature that would cause the defense to raise an objection then obviously the Court probably shouldn't even hear the motions.

THE COURT: Certainly, at least I shouldn't decide them.

MR. ROTATORI: I would agree with the Court in that regard. The only thing I can say is this sort of takes us by surprise. We really hadn't —

THE COURT: Have you made any progress in the last hour in ruminating about this counsel?

MR. ROTATORI: No, we discussed it briefly before we entered into the courtroom, at that time the Court was taking a plea.

I suppose — frankly, as counsel for Mr. Dandy, I would like to do some investigative work into this litigation, you know, whether there was personal animosity between Mr. Mowat and Mr. Dandy, that type of thing, whether Mr. Mowat has certain opinions with regard to Mr. Dandy's business style or ethics, and whether those — whether all would be relevant and whether those expressions from Mr. Mowat, a quote friend of the Court as the Court has described it, would raise to the level of requiring the defense to ask the Court to recuse itself.

THE COURT: I can conceive, counsel, of a set of circumstances in which that would — it would give a defendant pause. I don't think there's any reason for that at this point, quite frankly. I think that I — I'm going to give you the benefit of my feeling about it, without prejudice to

your ability to raise it, and determine what you think you need to do.

I think I am far enough distant from any particular friendship or former association with Mr. Mowat or any of the others in the London organization that I would not be influenced by apparent feelings of animosity if any were the case.

But I think it's only fair to give you a chance to ruminate about it further beyond just the 60 minutes or so you have had here.

I will — I hate to bring six people together for an hour and a half this afternoon without reaching any result on these things or allowing you to express your feelings about your various motions though. I'm inclined to receive some comments on the merits of your motion on Counts 1, 2, 8 and 9 at a minimum.

Mr. Haveland, just a moment ago you rose to address something, do you want to express some other feeling about this?

MR. HAVELAND: I apologize, your Honor, for rising but I fear the Court was about to rule, and I do want to oppose any motion to adjourn these arguments.

The defendant has today filed a motion to adjourn this case yet again after at least four adjournments have already been granted, most of them with the stipulation of the government. I do not see any basis for a further adjournment at this point.

The only think Mr. Rotatori has stated is that his client has informed him of some litigation between Mr. Mowat and Mr. Dandy.

So be it. I have no information —

THE COURT: Between the corporations, I think, was it not? Was it personal litigation?

MR. ROTATORI: There was personal litigation in addition to business litigation between the corporations, yes. It was both.

MR. HAVELAND: My argument makes — admits no distinction. Even if it was personal litigation between the two of them, so much the better for the defendant, he will have that available to impeach Mr. Mowat at trial.

The point here is whether the Court's knowledge of or friendship with Mr. Mowat would have any conceivable impact on the jury, which is going to be the finder of fact in this case.

Mr. Rotatori has not suggested anything that in any way would affect the jury's determination. Under those circumstances, I just do not see the point in adjourning the argument on these motions. I have no objection to him being given additional time to come up with some theory on which this fact should affect the trial, but I see no reason to delay matters right now.

THE COURT: Mr. Haveland, it's more than a defense decision. I don't think the Court's acquaintanceship with any particular witness would have any bearing on this, if such were urged I wouldn't go along with that line of argument. The concern I would have from the defense side of this would be in the event of conviction and impending sentence.

The thing I think Mr. Dandy's point of view needs to be resolved about is the Court's independent or potential impact on a variety of things that may have.

I reiterate, I think it would have none, quite frankly, but that's not determinative in my opinion.

I'm going to adjourn the hearing on these motions but I'm not going to adjourn them for long. I'm going to — this is Tuesday afternoon, and counsel for the defendant will inform my courtroom deputy clerk no later than the close of business on Thursday afternoon, the 16th of May, and concurrently inform me either by telephone or Fax transmission to Mr. Haveland on behalf of the government, any reaction along — a reaction one way or the other with respect to these issues we have discussed this afternoon.

At that time I'm going to be prepared to set a substitute hearing date. In the event I determine that either by stipulation or through my own judgment, the matter would be continued very shortly thereafter, within days I think, thereafter for argument on these issues.

You're all from Flint, are you not, gentlemen?

MR. ROTATORI: I'm from Cleveland, Ohio, your Honor.

THE COURT: Where are you from?

MR. PERLOVE: I live in Ann Arbor, but I practice in Flint, Judge.

THE COURT: Apparently there are regular flights from Cleveland into Flint?

MR. ROTATORI: Yes, there are.

THE COURT: Mr. Haveland, I think you're stationed in Flint?

MR. HAVELAND: Yes, your Honor.

THE COURT: The tax attorney?

MR. FOREMAN: Washington, DC, your Honor, but there are also regular flights in from Washington.

THE COURT: All right, counsel, that's the schedule. Thursday the 16th, by the close of business — that's going to be 5:00 o'clock p.m. — inform the Court, or before that, certainly a day in advance of that would be even better, but no later than that. You'll have enough time to inquire further of Mr. Dandy, and to do whatever additional research or thinking you think may be appropriate on this, and we'll determine an appropriate course of action following that.

* * *

## APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA

-vs- No. 90-20054-FL

ALEX DANDY, VOLUME XVII
Defendant.
_____/

Proceedings had and testimony taken in the above-entitled matter before the Honorable Robert H. Cleland, United States District Judge, at Bay City, Michigan, on the 8th day of October, 1991.

APPEARANCES:
STEPHEN MARKMAN, U.S. ATTORNEY
BY: ROBERT HAVELAND, AUSA,
AND THEODORE FOREMAN, AUSA,
Appearing on behalf of the Government
ROBERT ROTATORI, ESQ., and
KENNETH LORD, ESQ.,
Appearing on behalf of the Defendant.

* * *

THE COURT: All right, counsel, the defendant has absented himself through consent, and we will have some time here to discuss Rule 29 motions. Mr. Rotatori, you may proceed from counsel table, if you wish.

MR. ROTATORI: Is it the Court's desire we address tax counts even though there hasn't been —

THE COURT: Here's how I — I think I made this clear at sidebar conference, although some of it may not have been recorded. It seems to me that the government's case is substantially concluded at least with respect to direct examination in the first instance on the summary witness. Therefore, all of the affirmative evidence the government would seek to present is in, and failing some kind of major retraction by the summary witness on cross examination, that's the only thing that remains now before the close of the government's case as Mr. Haveland has indicated.

It seems to me that you can — we can roll all of this together and take, even though it's just a moment or two in the history of this case premature, technically, I think we can take this as having been conducted at the close of government's proofs. And the government has no objection to that procedure, I take it?

MR. HAVELAND: Correct.

THE COURT: Let's proceed on that basis.

MR. ROTATORI: Okay, your Honor, with regard to Counts 1 and 2, I think we can take them together and save time because the argument for both are the same.

With regard to Counts 1 and 2, the defendant in support of its motion for a judgment of acquittal pursuant to Rule 29, incorporates by reference, the legal memorandum submitted to the Court when the defendant moved to dismiss Counts 1 and 2 based upon the statute of limitations.

THE COURT: So you have a statute of limitations issue which is — which we have roundly discussed, and I have denied.

And is there any additional basis found within the evidence here at trial or lack — asserted lack of evidence with regard to any points in that case?

MR. ROTATORI: Substantively we have no Rule 29 motion with regard to Counts 1 —

THE COURT: Procedurally you wish to reiterate your motion — I don't even know it's necessary to do that, but in an abundance —

MR. ROTATORI: Just briefly. At the time we made the motion prior to the trial, we did not have the testimony of, I think, the most critical witness with regard to the government's position that the statute of limitation was extended with regard to Counts 1 and 2 because of the allegation in the superseding indictment that the — one of the acts of evasion constituted the concealing and attempting to conceal from proper officers of the United States of America, the income due.

The counts — both Counts 1 and 2 allege that the evasion occurred from a particular date of filing of the return through November of 1985. I assume November of '85 is the magic date that brings them within the statute of limitations, primarily because of evidence concerning the defendant's preventing the Internal Revenue Service from obtaining the McDonald Dairy checks.

In that regard we now have the testimony of Mr. Cowan, and I suppose, your Honor, we could include at this point in time, the charge in the indictment — since it also refers to Mr. Cowan — that is Count 6, which is the obstruction of the IRS audit.

I think the statute of limitations argument in that obstruction of the IRS audit argument are interrelated. I believe it's clear that the testimony of the Jim Cowan was that

with regard to the November 1985 IRS summons, he went to see Alex Dandy, that he discussed the checks that were called for in the summons. Mr. Cowan indicated that Alex Dandy had a different position with regard to some of the checks than he did. That he left that meeting and he went back to Mr. Geoghan, and Mr. Cowan said he told Mr. Geoghan to turn them all over.

Mr. Geoghan's testimony, on the other hand, was that Cowan told him not turn them all over.

Whether or not Cowan told Geoghan to turn them over or not turn them over, I think, fails to establish any connection with the defendant. Cowan was clear that Dandy had a different position, that he decided to turn them over anyway. So I don't see how the evidence supports the obstruction of that summons in November of '85 as alleged in Count 6. There's no connection with the failure to turn over and Dandy. The only possible connection would have been Cowan, and Cowan testifies to the contrary.

So I think Rule 29 should be granted with regard to the obstruction count, Count 6. That being the case, then the government loses their underpinnings for extending the statute of limitations as we have argued before in Court and submitted memorandum. We feel Counts 1 and 2 should be dismissed under Rule 29 based upon the statute of limitations argument we have presented to the Court previously.

THE COURT: Okay. Let's take these in series, Mr. Haveland, a comment please from the government with respect to the testimony of Mr. Cowan, Mr. Geoghan and inferences that could be drawn legitimately by a finder of fact with regard to those things.

MR. HAVELAND: Very briefly, your Honor. It is my recollection of Mr. Cowan's testimony that both in January and again in November of 1985, as soon as

McDonald Dairy had been served with the IRS summons, Mr. Cowan met with Mr. Dandy, discussed the summons, asked Mr. Dandy what he should do and Mr. Dandy instructed him in no uncertain terms not to deliver the third party checks that had been pulled out by Ed Geoghan under Mr. Cowan's instructions. These are checks but for Mr. Dandy's directions, McDonald would have delivered to the IRS both in January and in November of 1985.

That in itself, in November of 1985 Mr. Dandy's instruction to Mr. Cowan not to deliver the third party checks, is all that is required to prove an attempt to continue the tax evasion scheme within the five year period — excuse me, six year period.

Now, it is true that Mr. Cowan was somewhat — his testimony was that he disregarded Mr. Dandy's advice in November of 1985 and instructed Mr. Geoghan to turn over all the checks. In fact, however, Mr. Geoghan testified to the contrary, that Mr. Cowan did not instruct him to do that, that Mr. Cowan instructed him to withhold certain checks. Both Mr. Geoghan and Mr. Draheim have testified that McDonald Dairy did not, in fact, turn over these third party checks.

You may recall that Mr. Geoghan testified he still had those checks segregated and he gave them to Agent Georgeff approximately three or four years later.

But regardless of all that, all that is required is an attempt by the defendant to evade taxes within a statutory period. The testimony of Mr. Cowan is unequivocal that Mr. Dandy told him not to give those third party checks.

THE COURT: My notes in this section of Mr. Cowan's testimony indicate that he stated to the effect: I felt pressured, he represented a lot of business to McDonald Dairy — speaking of Mr. Dandy — and when asked about the issue of the checks, whether to turn them over, whether to segregate

them, whether to take them as indicative of some unimportant and ancillary event as Mr. Dandy was apparently trying to construe them at that meeting, taking the evidence in the light most favorable to the government — which is, of course, the required standard here — the Court finds that a reasonable trier of fact could conclude from all of the evidence and inferences drawn from the evidence that the defendant, indeed, was attempting to deal with Mr. Cowan in a way that would have the effect, and intentionally so, of interfering with the audit. The motion with respect to Count 6 accordingly must fail.

And with the same finding, the Court determines again here that based upon evidence at trial, that there is a rational foundation for the statute of limitations challenge that's been raised by the defense. And with respect to Counts 1 and 2 then the motion additionally will be denied.

* * *

## APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Nos. 92-1702 and 92-1840

---

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALEX DANDY,
Defendant-Appellant.

---

Appeal from the United States District Court
for the Eastern District of Michigan,
Northern Division

---

BRIEF FOR THE UNITED STATES

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* * *

ARGUMENT

I. THE TRIAL JUDGE'S ACQUAINTANCE WITH ONE WITNESS DID NOT CREATE A REASONABLE QUESTION AS TO THE JUDGE'S IMPARTIALITY.

District Judge Robert H. Cleland informed the parties months before trial that he was acquainted with Douglas Mowat, the president of London's Farm Dairy, Inc., a

corporation mentioned in the indictment. (Hearing of Mary 14, 1991 at 3-5). He described his relationship as a "friendly acquaintance," and stated that Mowat had probably contributed $10 or $20 to his campaigns for state circuit court judge; he had not seen Mowat "in well over a couple of years now and certainly [had] not had any discussion with him over the facts of this case . . . [n]or do I think I have discussed his business with him at all." Id. The government had previously given defense counsel a transcript of Mowat's grand jury testimony in the case. Id. at 6.

Defendant filed a motion for disqualification of Judge Cleland. (R. 48). The motion was based solely on Section 455(a), which provides that "Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Judge Cleland denied the motion in a thorough written order. (R. 52: Order Denying Motion).

The legal standard to be applied to a recusal motion under section 455(a) is well-established in this Circuit:

> A district judge is required to recuse himself "only if a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." This standard is objective and is not based "on the subjective view of a party."

United States v. Nelson, 922 F.2d 311, 319 (6th Cir.), cert. denied, 111 S. Ct. 1635 (1991). Application of this standard requires a brief discussion of the facts.

The most important fact to be considered in the instant case is that it involved a jury trial, not a bench trial. The

credibility of witness Mowat was to be determined by the jury, not the trial judge. Indeed, the jury was never made aware of the witness' acquaintance with the judge, a fact that was utterly irrelevant to the trial. Second, there was no uncertainty about the nature or scope of Mowat's expected testimony, as defense counsel already had a copy of his grand jury testimony. Defendant advanced no unusual legal issue likely to arise during Mowat's testimony and none in fact did.

Finally, Mowat was neither a party in the case nor a victim of any of the crimes charged. (Defendant's contrary claim in his brief on appeal at 13-14 is simply not supported by the testimony he cites; that Mowat arguably was impeached does not mean that he was a victim).* The indictment charged that defendant defrauded the Chatham Supermarket chain by misappropriating kickbacks paid by its supplier, London's Farm Dairy. Mowat, the President of London's, was hardly a victim; he and his firm actually benefited from the increased business Dandy steered their way. The only entity defrauded was Chatham/Nu-Trax, which paid higher prices for dairy products because its Chairman, Dandy, demanded personal kickbacks instead of rebates for the corporation. Accordingly, there was no reason to believe that Judge Cleland's acquaintance with the witness would affect the case in any way.

Defendant cites no case in which recusal was ordered under circumstances even remotely similar to these. This

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* Moreover, even prior contact with the victim of a crime is not sufficient to require recusal of a judge. United States v. Cuyler, 584 F.2d 644 (3d Cir. 1978), cert. denied, 440 U.S. 925 (1979) (trial judge had known murder victim and attended his funeral); United States v. Story, 716 F.2d 1088, 1091 (6th Cir. 1983) (trial judge had previously represented the victim - VFW National Home - and had recommended it to clients as a charitable bequest).

court has recently affirmed decisions not to recuse in circumstances far more suspicious. For example, in Easley v. University of Michigan Board of Regents, 906 F.2d 1143 (6th Cir. 1990), cert. denied, 111 S. Ct. 1414 (1991), a bench trial was at issue. The trial judge was closely involved with the defendant University as an alumnus, a volunteer fund-raiser, a member of its Law School's committee of visitors, and a member of the athletics support club. Nevertheless, the Sixth Circuit held that "the amicable feelings Judge Feikens undoubtedly has for his alma mater, the University of Michigan, fail to demonstrate a sufficient basis for his recusal." The court's judgment for the school was affirmed.

Detroit Mayor Coleman Young has been the subject of at least two motions to recuse trial judges. In Baker v. City of Detroit, 458 F.Supp. 374 (E.D. Mich. 1978), plaintiffs moved to disqualify then-District Judge Damon Keith due to his close friendship with the mayor; the motion was denied. On the other hand, In Re City of Detroit, 828 F.2d 1160 (6th Cir. 1987), overruled (on mandamus issue only), In Re Aetna Casualty and Surety Co., 919 F.2d 1136 (6th Cir. 1990), involved a motion by the City to recuse Judge Feikens, whom it accused of bias and prejudice against Major Young and other city officials. This court held that the City's appeal of Judge Feikens' refusal to recuse himself was not cognizable by way of a writ of mandamus; in an alternative holding, however, it ruled that the record revealed neither actual bias nor the appearance of partiality, despite the fact that Judge Feikens had been severely criticized by other judges and the media for his published comments concerning Major Young and his administration of the City departments at issue (water and sewage). Both these cases, too, involved bench trials; yet recusal was still not required.

This court discussed the issue most recently in United States v. Hurst, 951 F.2d 1490 (6th Cir. 1991), cert. denied, 112 S. Ct. 1952 (1992). In that case the trial judge, while a private attorney years earlier, had filed a lawsuit against

defendant Burnett on behalf of a group of investors alleging fraud. Burnett's motion for recusal pursuant to 28 U.S.C. §455(a) was denied, and this court affirmed: "We are satisfied that a reasonable person would consider the trial judge to be impartial in this matter and find no prejudice toward defendant Burnett." 951 F.2d at 1503.

The merits of defendant's pretrial motion must be determined, of course, on the basis of the record as it existed at the time the court ruled, nearly four months before trial began. On appeal, however, defendant attempts to buttress that motion by arguing that Judge Cleland imposed an "extraordinarily harsh" sentence in order to vindicate his friend Mowat. That sentence, however, was fully justified by the record evidence of the ten felonies Dandy committed, and the tens of millions of dollars in losses he imposed on hundreds of employees and other creditors of two major bankrupt supermarket chains. Far from being harsh, the sentence imposed likely will lead to Dandy's release on parole after serving only 1/3 of his sentence (92) months) — considerably less than the guideline range established by the U.S. Sentencing Commission for such crimes committed after November 1, 1987 (108-135 months). (R. 144: Supplement to Government's Sentencing Memorandum). Any reasonably objective observer would conclude that this sentence reflected the nature and circumstances of Dandy's crimes and his prior criminal record, rather than the trial judge's slight familiarity with one witness whom he had not seen for years.

To discourage forum-shopping, a trial judge must hear cases unless some reasonable factual basis to doubt his or her impartiality or fairness is shown by probative evidence. Blizard v. Frechette, 601 F.2d 1217, 1221 (1st Cir. 1979). Here, the trial judge's mere "friendly acquaintance" with one of the government's 56 witnesses at a ten-week long jury trial did not create a reasonable question as to the judge's impartiality. Accordingly, defendant's motion to disqualify Judge Cleland was properly denied.

Supreme Court, U.S.
FILED
FEB 8 1994
CLERK

No. 93-938

# In the Supreme Court of the United States

OCTOBER TERM, 1993

ALEX DANDY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the district judge did not abuse his discretion in declining to recuse himself because of a casual relationship with a government witness.

2. Whether the court of appeals erred in holding that petitioner waived his challenge to the sufficiency of the evidence supporting two of the counts of conviction.

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# In the Supreme Court of the United States

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a), as amended (Pet. App. 28a-33a), is reported at 998 F.2d 1344.

### JURISDICTION

The judgment of the court of appeals was initially entered on June 7, 1993. The court of appeals filed an amended opinion on August 11, 1993. A petition for rehearing was denied on September 15, 1993. Pet. App. 41a. The petition for a writ of certiorari was filed on December 14, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner was convicted on three counts of tax evasion, in violation of 26 U.S.C. 7201; three counts of willfully filing false amended tax returns, in violation of 26 U.S.C. 7206(1); one count of obstructing an IRS audit, in violation of 18 U.S.C. 1505; two counts of mail fraud, in violation of 18 U.S.C. 1341; and one count of bankruptcy fraud, in violation of 18 U.S.C. 152.[1] He was sentenced to 23 years' imprisonment. Pet. App. 6a. The court of appeals affirmed petitioner's convictions and sentence, but remanded for entry of a corrected judgment.

1. Petitioner assumed control over Hamady Brothers Food Markets, Inc. (Hamady) in 1981. McDonald Dairy, which was Hamady's dairy supplier, paid rebates to its customers based on the volume of their purchases. From 1982 to 1984, petitioner diverted more than $1 million in rebates from McDonald Dairy to his own account, but failed to report any of that money on his income tax returns for those years. Pet. App. 2a-3a.

Between 1982 and 1986, petitioner also received hundreds of thousands of dollars of additional unreported income from McDonald Dairy, from other suppliers, and from Hamady itself; more than $157,000 of those payments were disguised as donations to a "[c]haritable [f]und." Pet. App. 3a-4a. When the Internal Revenue Service issued summonses to McDonald Dairy in 1985 for records of rebate moneys that McDonald Dairy had paid, petitioner attempted to cover up the diversions by, among other things, directing McDonald Dairy to withhold all checks that represented direct or indirect payments to him. *Id.* at 4a.

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[1] One additional count of mail fraud was dismissed by the district court. Pet. App. 6a.

In March 1986, petitioner gained control of Nu-Trax, Inc. He then greatly increased Nu-Trax's purchases from certain suppliers. Under petitioner's direction, those suppliers in turn inflated the prices of their products in order to pay sham "consulting fees" to entities owned by petitioner and a sham "salary" to petitioner's son-in-law. Pet. App. 4a-5a.[2] Petitioner also diverted many of Nu-Trax's assets to himself and directed it to pay one of his wholly owned entities more than $275,000 in sham "consulting fees." When it became clear that Nu-Trax was destined for bankruptcy, petitioner forced Nu-Trax to buy a worthless stock option from him for more than $7 million in cash and real estate. He then prevented Nu-Trax from declaring bankruptcy during the one-year period within which the sale could have been set aside as an avoidable transfer under bankruptcy law. *Id.* at 5a.

2. Petitioner was originally indicted on December 14, 1990, and a superseding indictment was returned on April 12, 1991. Pet. App. 6a. Counts 1 and 2 of the original indictment charged petitioner with attempting to evade his 1982 and 1983 taxes on the dates he filed false tax returns for those years—June 13, 1983, and July 3, 1984, respectively. Counts 1 and 2 of the superseding indictment, however, alleged that petitioner's acts of evasion continued through November 1985. *Id.* at 21a.

At the close of the government's case, defense counsel made a motion under Fed. R. Crim. P. 29 for a judgment of acquittal. Pet. App. 28a. With respect to Counts 1 and 2, however, defense counsel stated that "[s]ubstantively we have no Rule 29 motion with regard to Counts 1 [and 2]." *Id.* at 29a. Defense counsel did reassert petitioner's

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[2] Petitioner omitted those kickbacks from his 1986 income tax return. Pet. App. 5a-6a.

pretrial motion to dismiss those counts based upon the statute of limitations, and he also argued that the government had failed to prove Count 6 of the indictment (which alleged petitioner's November 1985 obstruction of an IRS audit) and as a result had failed to establish an affirmative act of evasion within the six-year limitations period applicable to Counts 1 and 2. *Id.* at 29a-30a, 53a-54a. The district court rejected petitioner's challenge to Counts 1, 2, and 6. *Id.* at 56a.

At the close of all the evidence, defense counsel made a "general renewal" of the Rule 29 motion, and once again he argued that the evidence on Count 6 was insufficient. Pet. App. 30a (emphasis omitted). The district court denied petitioner's motion. *Ibid.*

3. Count 8 of the superseding indictment charged petitioner with defrauding Nu-Trax by obtaining money that should have been paid to it. As part of the scheme to defraud, petitioner was alleged to have caused Nu-Trax to purchase dairy products from London's Farm Dairy, Inc. (London's Dairy), in return for kickbacks paid to petitioner. C.A. App. 51-53; see also Pet. App. 23a-25a.

Several months prior to trial, the district judge informed the parties that he was acquainted with Douglas Mowat, the president of London's Dairy, who was expected to be a witness. The judge explained that he had a casual acquaintance with Mowat, and that Mowat and "others from the London organization" may have contributed $10 or $20 apiece to his campaign when the judge served as an elected official in St. Clair County, Michigan. Pet. App. 6a-7a, 44a. The judge added, however, that he had not seen Mowat in over two years, that he had never been to Mowat's home, that Mowat had never been to his home, and that he and Mowat had never discussed London's Dairy or the facts of this case. *Ibid.* The judge also disclosed his acquaintance with various members of

the London family, including Glen London, who lived across the street from the judge when the judge was in college and law school, and Terry London, a Michigan state representative. To the judge's knowledge, however, Glen London was no longer associated with London's Dairy, and Terry London was not associated with the corporation in any way. *Id.* at 7a, 43a.

Petitioner moved to recuse the judge under 28 U.S.C. 455(a). The judge denied the motion. Pet. App. 34a-38a.[3] Mowat later testified at petitioner's trial.

4. The court of appeals affirmed in pertinent part. Pet. App. 1a-33a. The court first rejected petitioner's claim that the district court erred in denying petitioner's motion to recuse. *Id.* at 6a-9a. The court explained that recusal is required by 28 U.S.C. 455(a) when "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Id.* at 7a-8a (quoting *United States* v. *Nelson*, 922 F.2d 311, 319 (6th Cir. 1990), cert. denied, 499 U.S. 981 (1991)). Finding that the district judge was merely an acquaintance of Mowat and the London family rather than a close personal friend, the court concluded that the judge's "relationship with the London family and Mowat was not of a sufficiently intimate degree to induce a reasonable person with knowl-

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[3] Among other things, the judge noted that he would not be called upon to make credibility determinations because the case was being tried to a jury, and that the alleged victim of the fraud was Nu-Trax, not London's Dairy or Mowat. Pet. App. 36a-37a. The judge also noted that several hundred people had contributed to his reelection campaign for county prosecutor. *Id.* at 35a.

edge of all the facts to conclude that [the judge's] impartiality could be reasonably questioned." Pet. App. 9a.[4]

The court of appeals also rejected petitioner's claim that the evidence was insufficient to sustain his convictions on Counts 1 and 2. Pet. App. 21a-23a, 28a-33a. The court held that the statute of limitations did not begin to run on Counts 1 and 2 until petitioner's final acts of evasion in November 1985. *Id.* at 21a-23a. The court further held that petitioner had waived any broader challenge to the sufficiency of the evidence on Counts 1 and 2. The court explained that petitioner's "Rule 29" motion did not actually challenge the general sufficiency of the evidence with respect to those counts and that his assertion of specific, statute-of-limitations grounds for the motion meant that he had waived all other grounds. *Id.* at 28a-33a.[5]

## ARGUMENT

1. Petitioner contends (Pet. 13-17) that the court of appeals improperly disregarded the standards applicable to disqualification motions when it concluded that the district judge was not required to recuse himself in this case. The court of appeals applied the correct legal

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[4] The court of appeals also relied on the facts that Mowat was merely one of many government witnesses, that the judge did not have to determine Mowat's credibility, that Mowat had no personal stake in the outcome of the case, and that London's Dairy was not a victim of petitioner's offenses because it had actually received more business as a result of its payments to petitioner. Pet. App. 8a-9a.

[5] The court of appeals rejected all but one of petitioner's remaining claims of reversible error. Pet. App. 9a-26a. The court agreed with petitioner and the government that the district court had lacked jurisdiction to issue a "corrected judgment," and accordingly vacated that judgment and remanded to allow the district court to clarify petitioner's parole eligibility date. *Id.* at 27a.

standard in reaching that conclusion, however, and further review is therefore not warranted.

The court of appeals correctly recognized (Pet. App. 7a-8a) that the standard for recusal is an objective one, and that a district judge "must recuse himself where 'a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'" Accord 28 U.S.C. 455(a) (judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"); *United States* v. *Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992). The court of appeals then made a correct, fact-bound determination (Pet. App. 8a-9a) that a reasonable observer would not question the judge's impartiality in this case, given (1) the casual and insignificant nature of the judge's relationship with Mowat and the London family, (2) the fact that Mowat was merely one of many government witnesses and had no personal stake in the outcome of the case, and (3) the fact that London's Dairy had not been injured by petitioner's crimes. See *United States* v. *Lovaglia*, 954 F.2d at 815-817; *Clay* v. *Doherty*, 608 F. Supp. 295, 300 (N.D. Ill. 1985).

Contrary to petitioner's assertions, the legal standard applied by the court of appeals is entirely consistent with the standard set forth in this Court's decision in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988). See *id.* at 858 n.7 (Section 455(a) adopts an objective test for recusal); *id.* at 861 (Section 455(a) violated when "an objective observer would have questioned [the judge's] impartiality"). The court of appeals properly examined the facts from the perspective of an objective, reasonable observer and concluded that there was no

basis for questioning the district judge's impartiality. *Liljeberg* requires no more.[6]

Petitioner also errs in asserting (Pet. 16) that the Fifth Circuit disqualified a district judge under "similar circumstances" in *In re Faulkner*, 856 F.2d 716 (1988). In *Faulkner*, the Fifth Circuit disqualified a judge under 28 U.S.C. 455(a) after finding that "a relative with a close relationship to the judge" was an "important participant in key transactions," that the relative might well testify at trial, and, "[p]erhaps even more importantly, that [the] relative ha[d] communicated to the judge * * * material facts and her opinions and attitudes regarding those facts." 856 F.2d at 721 & n.8.

In this case, by contrast, the judge never discussed the facts of the case with Mowat. Pet. App. 44a. Moreover, the judge's relationship with Mowat and the London family was only casual and inconsequential, whereas in *Faulkner* the potential witness was the district judge's first cousin and the judge described their relationship as "more like that of 'brother and sister.'" 856 F.2d at 718. Thus, *Faulkner* is plainly distinguishable from the facts of this case.

Finally, there is no merit to petitioner's claim (Pet. 16) that the 23-year sentence of imprisonment imposed on petitioner created an appearance of partiality. Given the inconsequential nature of the judge's relationship with Mowat and the London family and the judge's care-

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[6] Petitioner relies (Pet. 14) on the *Liljeberg* Court's conclusion (486 U.S. at 859) that "[s]cienter is not an element of a violation of § 455(a)." That holding provides no support to petitioner, however. The court of appeals did not examine the subjective knowledge and state of mind of the district judge in concluding that recusal was not required; rather, the court found that the facts were insufficient to cause an objective observer to doubt the judge's impartiality. Pet. App. 9a.

ful, detailed, and compelling explanation for the lengthy sentence imposed on petitioner,[7] no reasonable observer would have questioned the judge's impartiality based on the sentence imposed.[8] Accordingly, further review of this issue is not warranted.[9]

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[7] The judge explained that the sentence was appropriate in view of the "extraordinary seriousness" of petitioner's crimes, which could be measured in terms of the millions of dollars petitioner had misapplied, stolen, and failed to report, and by the hundreds, if not thousands, of working people whose lives were "thrown into turmoil and ruin" by petitioner's crimes. C.A. App. 765. The court also pointed to petitioner's prior criminal record, his willingness to "employ virtually any ruse, speak virtually any lie and deliver virtually any threat needed to continue the flow of cash into his pockets," and the fact that petitioner had "intimidated and financially seduced" merchants and even a priest. *Id.* at 763-764. In addition, the judge expressed his belief that the sentence would deter other would-be criminals and protect society from petitioner, who was fully capable of continuing his criminal activities and who had no reasonable chance of rehabilitation. *Id.* at 765-767. Finally, as the district court pointed out (*id.* at 769), petitioner will be eligible for parole after serving just one-third of his sentence. Pet. App. 27a.

[8] Similarly, no appearance of partiality arose at sentencing as a result of the district judge's reference to petitioner's intimidation and financial seduction of merchants (see note 7, *supra*). For one thing, as the court of appeals found (Pet. App. 8a), it is far from clear that the judge's reference to "merchants" embraced London's Dairy. In any event, the judge's comment did not give rise to an appearance of partiality, because his connection with London's Dairy was quite attenuated.

[9] There is no reason to hold this petition pending the Court's disposition of *Liteky* v. *United States*, No. 92-6921 (argued Nov. 3, 1993). The question presented in *Liteky* is whether a motion to recuse under 28 U.S.C. 455(a) may be based upon allegations that a judge has developed a bias as a result of presiding over judicial proceedings. Petitioner's motion to recuse was based entirely on

2. Petitioner also contends (Pet. 17-19) that the court of appeals erred in holding that he failed to preserve his challenge to the sufficiency of the evidence on Counts 1 and 2. That contention does not merit review by this Court.

Defense counsel explicitly circumscribed his "Rule 29 motion" on Counts 1 and 2 by informing the district court that "[s]ubstantively we have no Rule 29 motion" as to those counts (Pet. App. 52a-53a) and by emphasizing that his statute-of-limitations claim with respect to those counts turned on his sufficiency-of-the-evidence claim regarding Count 6. See *id.* at 53a ("I think the statute of limitations argument in [*sic*] that obstruction of the IRS audit argument are interrelated."); *id.* at 54a ("So I think Rule 29 should be granted with regard to the obstruction count, Count 6. *That being the case*, then the government loses their underpinnings for extending the statute of limitations [on Counts 1 and 2]."") (emphasis added)). Thus, in the district court, petitioner based his claim regarding Counts 1 and 2 entirely on his sufficiency-of-the-evidence challenge to Count 6.

On appeal, however, petitioner failed to challenge the sufficiency of the evidence on Count 6 (Pet. App. 30a), and his only argument with respect to the sufficiency of the evidence on Counts 1 and 2 was that the government had failed to prove any affirmative acts of evasion within the statute of limitations. Pet. C.A. Br. 41-42; Pet. C.A. Reply Br. 18-20. The court of appeals rejected that argument on the merits, finding that petitioner attempted to evade his 1982 and 1983 taxes in November 1985, well within the limitations period. The court explained:

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allegations of extrajudicial bias, and thus *Liteky* will shed no light on the proper disposition of this case.

> [T]the statute of limitations for income tax evasion alleged in Counts 1 and 2 in this case did not begin to run *until the last affirmative evasive acts occurring sometime in November of 1985.* * * * [I]t is these evasive acts, occurring within six years of the superseding indictment, which form the basis of the crimes alleged in Counts 1 and 2 of the superseding indictment. * * * [H]ad it not been for [petitioner's] evasive acts in 1985, the IRS would very likely have discovered [petitioner's] income tax fraud occurring in 1982 and 1983.

Pet. App. 23a; see also *id.* at 22a ("in this case, [petitioner's] evasive acts in 1985 prevented the IRS from learning about [petitioner's] income tax fraud occurring in 1982 and 1983"). Thus, contrary to petitioner's contention (Pet. 19 n.3), the court of appeals did not refuse to address his claim that none of his acts of evasion occurred within the limitations period.

To be sure, the court of appeals went on to suggest that petitioner failed to preserve any more general challenge to the sufficiency of the evidence on Counts 1 and 2. Pet. App. 28a-33a. But petitioner does not seek to make any such general challenge to the sufficiency of the evidence in this Court, nor did he make such a claim below. Rather, petitioner's only claim is that the evidence was insufficient to support a finding that his acts of evasion occurred within the limitations period. Under those circumstances, the court of appeals acted properly in concluding that petitioner had expressly disavowed any more general challenge to the sufficiency of the evidence on Counts 1 and 2. The court was not required to consider arguments that were disavowed in the district court and not pursued on appeal.

In any event, as the court of appeals noted (Pet. App. 31a), a motion under Fed. R. Crim. P. 29 that is limited to specific grounds fails to preserve all other grounds not raised, because "[t]he specification of grounds * * * is an indication that counsel has evaluated the record and has these particular reasons for his motion." *United States* v. *Rivera*, 388 F.2d 545, 548 (2d Cir.), cert. denied, 392 U.S. 937 (1968).[10] Contrary to petitioner's contention, that conclusion does not conflict with the Second Circuit's decision in *United States* v. *Gjurashaj*, 706 F.2d 395 (1983). *Gjurashaj* reaffirms the general proposition that a defendant making a general motion for a judgment of acquittal need not specify the precise grounds for the motion (*id.* at 399), but it does not address the question whether a Rule 29 motion that is limited to specific grounds fails to preserve other grounds not raised.

Similarly, the decision below does not conflict with *United States* v. *Jones*, 174 F.2d 746 (7th Cir. 1949). In *Jones*, the court held that "the defendant is not required to go over the proof for the benefit of the Government or the court, *in the absence of some request for more spe-*

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[10] *United States* v. *McDonough*, 603 F.2d 19 (7th Cir. 1979), is not to the contrary. *McDonough* holds only that a specific Rule 29 motion that ignores the issue of venue fails to preserve that issue. 603 F.2d at 22. It does not purport to resolve the question whether other types of sufficiency claims can be forfeited in the same manner. In particular, *McDonough* does not address the effect of a defendant's failure to assert a claim based on the statute of limitations, which, like venue, is not an element of the offense (see *United States* v. *Walsh*, 700 F.2d 846, 856 (2d Cir.), cert. denied, 464 U.S. 825 (1983)), and can be waived. See, *e.g.*, *Acevedo-Ramos* v. *United States*, 961 F.2d 305, 307 (1st Cir.), cert. denied, 113 S. Ct. 299 (1992). But see *United States* v. *York*, 888 F.2d 1050, 1057 n.10 (5th Cir. 1989).

*cific objection*." 174 F.2d at 748 (emphasis added). The Seventh Circuit has made clear that *Jones* is limited to the circumstances of that case: "we see no reason for extending [*Jones*] beyond its own narrow factual predicate. * * * [T]he failure to urge the matter when asked to be specific forecloses, in our opinion, raising the question on this appeal." *United States* v. *McDonough*, 603 F.2d 19, 22 (7th Cir. 1979). In this case, the district court did ask defense counsel for a more detailed explanation of his Rule 29 motion, at which point defense counsel disclaimed any "[s]ubstantive[]" motion and based his entire argument on the asserted insufficiency of the evidence on Count 6. Pet. App. 53a-54a. Thus, there is no circuit conflict, and further review is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 93-938

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

ALEX DANDY,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITIONER'S REPLY MEMORANDUM

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

# PETITIONER'S REPLY MEMORANDUM

1. The Courts Below Ignored Liljeberg.

This Court has clearly laid down the standards governing judicial disqualification — a judge must disqualify himself whenever his participation in a case creates even the *appearance* of partiality or impropriety. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). Neither the court of appeals nor the district court (and not even the government in its briefs below) mentioned *Liljeberg* in their discussion of the disqualification issue. The Solicitor

General's opposition glosses over this glaring omission, arguing that the legal standard applied by the court below was "consistent" with the standards enunciated in *Liljeberg* (Br. in Opp. 7). In fact, it was not.

Part of the family that owned the company that was the principal complaining witness on Count Eight lived across-the-street from the judge through the time that he completed law school. The president of the company was "known" to the judge for "close to twenty years" and contributed to the judge's political races for local prosecutor. These facts surely provided enough basis for the defense to be permitted to investigate these associations further. The judge, however, gave the defense *two* days within which to move for his disqualification (Pet. App. 49a-50a), and then denied the motion to disqualify.

The court of appeals paid lip service to the notion that the standard governing disqualification is "objective" (Pet. App. 8a), but the standard actually applied was subjective. According to Judge Cleland, his relationship with Douglas Mowat, the company president, was not an "intimate, personal relationship" nor was it one in which he would be "obligated" to Mowat (Pet. App. 8a). The court of appeals further emphasized that Mowat did not have a personal stake in the litigation "which might have influenced Judge Cleland" (Pet. App. 8a). And the court of appeals devoted nearly a full paragraph to considering whether London's Dairy, which was run by Mowat and owned by other longtime acquaintances of Judge Cleland, "*was considered by Judge Cleland* to be a victim" of petitioner's crime (Pet. App. 8a-9a; emphasis added). This analysis of the trial judge's subjective feelings about a government witness conflicts with the dictates of *Liljeberg*.

Moreover, the Solicitor General relegates to a footnote the court of appeals' statement that Judge Cleland did not judge Mowat's credibility since petitioner was tried by a jury (Pet. App. 8a). This fact was also relied upon by the district court in its order denying petitioner's motion for disqualification (Pet. App. 36a). This allocation of functions may bear upon actual prejudice, but *Liljeberg* requires disqualification even in cases where there is only the appearance of partiality. 486 U.S. at 860. The mere fact that the judge is not the initial decisionmaker does not avoid the appearance of partiality under *Liljeberg*, particularly when a judge is involved over an extended period of time with the principals of a company that appears to be the victim of the accused's offenses.

In short, the courts below not only failed to mention the *Liljeberg* standards, but they failed to apply them. Moreover, the petitioner was entitled to more time in which to investigate the relationship between Judge Cleland and the various principals of London's Farm Dairy. And on the known facts, the judge should have recused himself under 28 U.S.C. § 455(a).

2. The District Court's Sentence Creates an Appearance of Partiality.

The Solicitor General argues that the Judge's explanation for imposing the extraordinarily harsh 23-year sentence somehow tempers any appearance of partiality in the sentencing. The argument ignores the critical facts:

(a) Judge Cleland *himself* first raised the concern about his impartiality in the event of sentencing. At the May 14, 1991, hearing where he first disclosed his long-time association with Mowat and members of the London family,

the judge stated that "[t]he concern I would have from the defense side of this would be in the event of conviction and impending sentence" (Pet. App. 48a).

(b) Judge Cleland later denied petitioner's motion for disqualification on the plainly mistaken ground that any sentence would be subject to the "leveling and objectifying effect" of the Sentencing Guidelines (Pet. App. 37a).

(c) After petitioner's conviction, Judge Cleland discovered that the Sentencing Guidelines did not in fact apply, and, exercising the broad discretion that federal judges had before the effective date of the Sentencing Guidelines, he sentenced petitioner to a total of 23 years' imprisonment (J.A. 768-69).

Where, as here, the trial judge himself initially recognizes that questions might be raised as to his impartiality at the time of sentencing, and where his only expressed reason for rejecting those concerns at the time is his erroneous belief that the Sentencing Guidelines prevent any appearance of injustice, and where he ultimately imposes a sentence of 23 years' imprisonment when he discovers he is not constrained by the Guidelines, a reasonable person would surely raise an eyebrow. A correct application of this Court's *Liljeberg* decision would require disqualification because of the appearance of unfairness in the sentencing process.

3. The Court of Appeals Refused To Consider Petitioner's Claim That No Acts of Tax Evasion Occurred Within the Limitations Period.

The Solicitor General now surprisingly claims that the court of appeals considered on the merits petitioner's argument that there was insufficient evidence of acts of tax

evasion within the limitations period (Br. in Opp. 10). This is directly contrary to the position taken by the government in the court below and to the holding of the court of appeals.

In his original Rule 29 motion petitioner's trial counsel argued that Counts One and Two were barred by the statute of limitations because there was insufficient evidence that any acts of tax evasion had occurred within the limitations period (Pet. App. 53a-54a). The Solicitor General acknowledges that petitioner also claimed on appeal that the government failed to provide sufficient evidence of any acts of evasion within the statute of limitations period (Br. in Opp. 10).

The Solicitor General erroneously responds that the claim that there was no proof of "any affirmative acts of evasion within the statute of limitations" was rejected on its merits by the court of appeals. Only in *dictum*, according to the Solicitor General, did the court "suggest that petitioner failed to preserve any more general challenge to the sufficiency of the evidence" (Br. in Opp. 10-11). That is *not* what the court of appeals said it did. The court of appeals responded to petitioner's argument "that evidence of affirmative acts of evasion within the statutory period is insufficient to sustain his conviction on Counts 1 and 2" with a clear holding — "we decline to consider this issue" (Pet. App. 23a). How the Solicitor General can characterize this as a decision on the merits by the court below is a total mystery!

Indeed, the portions of the court of appeals' opinion that the Solicitor General cites to prove that the court below ruled "on the merits" of petitioner's claim that there was no proof of "affirmative acts of evasion within the statute of limitations" did not concern that issue at all. They concerned the question whether, *regardless of acts of evasion*, the statute

of limitations runs from the dates on which the tax returns were filed (Pet. App. 21a-22a).

4. The Waiver Rule Invoked by the Court of Appeals Is Untenable.

The Solicitor General makes a tortured effort to defend the holding of the court below that a defendant who asserts specific grounds for his Rule 29 motion waives all other grounds. The effort proves the error of the proposition.

In an attempt to reconcile the holding of the court of appeals with the clear rule of the Second Circuit that a motion under Rule 29 need not specify the particular grounds (*United States v. Gjurashaj*, 706 F.2d 395 (2d Cir. 1983)), the Solicitor General argues that although a defendant need not specify *any* grounds when he makes a Rule 29 motion, a specification results in the waiver of any ground not specified. In *Gjurashaj*, however, the defendant did provide specifics on some aspects of the government's failure of proof, but failed to make an argument with respect to one count. The Second Circuit firmly rejected the government's argument that, by making a specific argument, he had waived any claim that the evidence was insufficient with respect to other counts.

The perverse result of the Solicitor General's argument is that Rule 29 arguments would have to drag on for hours or days so that no potential factual issue is waived. Alternatively, a defense lawyer must be so general in his motion that it will be of no help to the trial judge. Courts have refused to require the specificity demanded by the Solicitor General's rule precisely to avoid this consequence.

## CONCLUSION

Our petition for a writ of certiorari argues that both legal issues presented can be resolved summarily, without plenary briefing and argument. For the foregoing reasons, a writ of certiorari should be granted and the judgment of the court of appeals should be vacated.

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